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PETITION OF UTEX §
COMMUNICATIONS CORPORATION §
FOR ARBITRATION PURSUANT TO §
SECTION 252(b) OF THE FEDERAL §
TELECOMMUNICATIONS ACT AND §
PURA FOR RATES, TERMS, AND §
CONDITIONS OF INTERCONNECTION §
AGREEMENT WITH SOUTHWESTERN §
BELL TELEPHONE COMPANY §

PUBLIC UTILITY COMMISSION
OF TEXAS

PROPOSAL FOR AWARD

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PROPOSAL FOR AWARD

This Arbitration Award (Award) establishes the interconnection agreement (ICA) between Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T Texas) and UTEX Communications Corporation (UTEX). The parties shall incorporate the decisions in this Award, including those in the attached matrices, into their ICA.

I. JURISDICTION

The Federal Communications Act of 1934¹ as amended by the Federal Telecommunications Act of 1996 (FTA)² authorizes a state commission to arbitrate open issues between an incumbent local exchange carrier (ILEC) and a requesting telecommunications carrier.³ The FTA authorizes a state commission to approve or reject an interconnection agreement (ICA) developed through negotiation or arbitration.⁴ The FTA's authorization to approve or reject an ICA carries with it the authority of the state commission to interpret and enforce provisions of the ICA.⁵ The Public Utility Commission of Texas (Commission) is a state commission responsible for arbitrating ICAs approved pursuant to the FTA.

¹ Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

² Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 15 and 47 U.S.C.).

³ 47 U.S.C. § 252(b).

⁴ 47 U.S.C. § 252(e).

⁵ *Southwestern Bell Tel. Co. v. Public Util. Commission of Texas*, 208 F.3d 475, 479-480 (5th Cir. 2000); *see also*, *Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364-365 (4th Cir. 2004); *Michigan Bell Tel.*

II. PROCEDURAL HISTORY

UTEX filed its petition to arbitrate an interconnection agreement with AT&T Texas on July 31, 2002, and AT&T Texas filed its response on August 26, 2002. UTEX filed its amended petition for arbitration on February 6, 2003, and AT&T Texas filed its response on March 4, 2003. UTEX filed its second amended petition on February 17, 2005, and AT&T Texas filed its response on March 14, 2005. The Commission issued an order abating this docket on June 22, 2006. In 2009, UTEX filed a petition for preemption with the Federal Communications Commission (FCC). On October 9, 2009, the FCC denied the petition for preemption, but indicated in the order that a new petition for pre-emption would be considered if the Commission failed to act on the dispute within nine months. UTEX filed its motion to unabate the docket on November 17, 2009. The Commission issued an order unabating this docket on December 17, 2009. The Arbitrators issued an order on December 22, 2009 requiring the parties to file a joint decision-point list (DPL) setting out the issues in dispute and ICA language by January 29, 2010. The Arbitrators convened a prehearing conference on January 15, 2010. Numerous disagreements arose between the parties, and they were unable to file the joint DPL and ICA language by the deadline imposed by the Arbitrators. The parties eventually filed a joint DPL and ICA language on March 29, 2010. The parties filed direct testimony on March 29, 2010 and filed rebuttal testimony on April 7, 2010. The Arbitrators convened a hearing on the merits on April 13-15, 2010. The parties filed initial briefs on April 27, 2010 and filed reply briefs on May 7, 2010.

III. RELEVANT STATE AND FEDERAL PROCEEDINGS

Relevant Commission Decisions

Docket No. 16630

In Docket No. 16630, the Commission addressed whether extended area service (EAS) traffic is subject to FTA §§ 251 and 252 such that reciprocal, cost-based compensation obligations

Co. v. Strand, 305 F.3d 580, 583 (6th Cir. 2002); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-338 (7th Cir. 2000); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds*; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-497 (10th Cir. 2000); *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277-1278 (11th Cir. 2003).

apply.⁶ The Commission concluded that EAS traffic qualifies as “telephone exchange service” under FTA § 153(47)(b) because it is “comparable to, without becoming, local exchange service.”⁷ The Commission also concluded that, as a policy matter, rates for EAS service should be cost-based.⁸ Until such cost-based rates could be determined, the Commission imposed interim rates of \$0.0183/minute of use for transport and termination plus, for optional two-way EAS service, an additive form of compensation to replace a portion of either lost toll or lost access revenue.⁹

Docket No. 21982

In Docket No. 21982, the Commission sought to resolve reciprocal compensation issues involving the Texas 271 Agreement (T2A).¹⁰ The Commission solicited participation by carriers that had T2A agreements expiring around January of 2000 or that had selected the first or third reciprocal compensation option of Attachment 12 of the T2A.¹¹ In this docket, the Commission established the following bifurcated compensation rate for both local voice traffic and local ISP-bound traffic: \$0.0010887 per call plus \$0.0010423 per minute.¹² In addition, the Commission found that reciprocal compensation arrangements applied to calls originating from and terminating to an end-user within a mandatory single or multi-exchange local calling area.¹³

⁶ *Application of Lone Star Net, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement Between Lone Star Net, Inc. and Southwestern Bell Telephone Company*, Docket No. 16630, Arbitration Award at 4 (Mar. 7, 1997).

⁷ *Id.* at 5.

⁸ *Id.* at 6.

⁹ *Id.* at 6, 8.

¹⁰ *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunication Act of 1996*, Docket No. 21982 (Nov. 15, 2000).

¹¹ Docket No. 21982, Order No. 1, Order Regarding Proceeding, Requesting Statements of Position, and Setting Prehearing Conference at 1 (Jan. 14, 2000).

¹² Docket No. 21982, Revised Arbitration Award at 53 (Aug. 31, 2000).

¹³ *See* Docket No. 21982, Order Approving Revised Arbitration Award, as Modified, and Approving Implementing Language at 5 (Nov. 15, 2000); Revised Arbitration Award at 18 n.59 (Aug. 31, 2000).

Docket No. 24015

In Docket No. 24015, the Commission concluded that ISP-bound foreign exchange (FX) traffic should be subject to a bill and keep compensation mechanism.¹⁴ The Commission deferred consideration of the compensation for non-ISP-bound FX traffic until Docket No. 28821.¹⁵

Docket No. 28821

In Docket No. 28821, the Commission established the terms and conditions for the successor interconnection agreements to the T2A originally adopted by the Commission in October 1999. The Commission addressed a number of issues including general terms and conditions, intercarrier compensation, interconnection, unbundled network elements, resale, compensation for FX traffic, performance measures, and the definition of end-user and end-user customer. This docket also affirmed the Commission's authority to arbitrate a self-executing performance remedy plan.¹⁶

Docket No. 33323

In Docket No. 33323, the Commission addressed a post-interconnection dispute between AT&T Texas and UTEX relating to UTEX's provision of calling party number (CPN) information and AT&T Texas's assessment of access charges for traffic involving UTEX's ESP customers, among other things.¹⁷ With respect to the CPN issue, the Commission concluded that the parties' ICA required UTEX to provide CPN information for the traffic UTEX passed to AT&T Texas that reflects the actual telephone number of the calling party in the LERG and is in the format of a 10-digit NPA/NXX.¹⁸ With respect to the access charge issue, the Commission

¹⁴ *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*, Docket No. 24015, Revised Arbitration Award at 58 (Aug. 28, 2002).

¹⁵ Docket No. 24015, Order on Reconsideration at 1 (Nov. 4, 2004).

¹⁶ *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, Order Approving Interconnection Agreement Amendment and Establishing Implementation Procedures (September 27, 2006).

¹⁷ *Petition of UTEX Communications Corp. for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corp.*, Docket No. 33323, Arbitration Award (June 1, 2009).

¹⁸ Docket No. 33323, Arbitration Award at 76-80.

concluded that the ESP exemption in the parties' ICA applies only where the telecommunications component of a call originates and terminates in the same local calling area.¹⁹ Consequently, the parties' ICA required UTEX to pay access charges for traffic involving its ESP customers that were located outside the local calling area.²⁰

Relevant Federal Communications Commission Decisions

ESP Exemption Order

In the *ESP Exemption Order*, the FCC exempted enhanced service providers (ESPs) from the FCC's new access charge regime because, according to the FCC, imposing access charges on ESPs could affect their viability.²¹ The FCC effectuated this exemption by defining the term "end user" to include ESPs for purposes of the FCC's access charge rules and then assessing access charges upon carriers and not upon end users.²²

Northwestern Bell Order

In the *Northwestern Bell Order*, the FCC clarified that ESPs are treated as end users under the FCC's access charge rules and are, therefore, not subject to access charges.²³ The FCC also stated, however, that an end user, including an ESP, that purchases interstate services from an interexchange carrier does not thereby create an access charge exemption for that carrier.²⁴

¹⁹ Docket No. 33323, Order on Reconsideration at 4 (Feb. 12, 2010).

²⁰ Docket No. 33323, Arbitration Award at 66-67.

²¹ *In the Matter of MTS and WATS Market Structure*, CC 78-72, Memorandum Opinion and Order ¶ 83, 1983 WL 183026 (rel. Aug. 22, 1983) (*ESP Exemption Order*).

²² *See id.* at Appendix A.

²³ *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, CC 86-1, Memorandum Opinion and Order ¶ 20, 2 FCC Rcd. 5986 (rel. Oct. 5, 1987), *vacated as moot* by Memorandum Opinion and Order, 7 FCC Rcd. 5644 (rel. Sept. 4, 1992).

²⁴ *Id.* ¶ 21.

First Report and Order

In the *First Report and Order*, the FCC addressed numerous issues related to the implementation of the FTA, including interconnection, access to UNEs, methods of obtaining interconnection and access to UNEs, and resale, and adopted rules addressing those issues.²⁵

ISP Remand Order

In the *ISP Remand Order*, the FCC established intercarrier compensation rates for ISP-bound traffic.²⁶ In reaching its decision, the FCC noted that while “ISPs use *interstate* access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under *local* tariffs.”²⁷ The FCC reiterated that “retaining the ESP exemption is important in order to facilitate growth of Internet services.”²⁸ The FCC also concluded that FTA §§ 251(b)(5) and 251(d)(2) apply not only to local traffic but to all traffic not excluded by FTA §251(g).²⁹

Core Mandamus Order

In the *Core Mandamus Order*, the FCC responded to a D.C. Circuit court decision overturning the legal basis for the FCC’s ISP-bound traffic compensation rules adopted in the ISP Remand Order.³⁰ In articulating a new legal basis for those rules, the FCC reiterated its conclusion in the ISP Remand Order that FTA § 251(b)(5) is not limited to local traffic.³¹ The FCC also found that, while ISP-bound traffic was subject to FTA § 251(b)(5), the FCC could nevertheless adopt its ISP-bound traffic compensation rules under FTA §§ 201 and 251(i).³²

²⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC 96-98, First Report and Order, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996).

²⁶ *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order ¶ 78, 16 FCC Rcd. 9151 (rel. Apr. 27, 2001).

²⁷ *Id.* ¶ 11. The term ISP means Internet service provider in this context. ISPs are a subset of ESPs.

²⁸ *Id.* ¶ 29.

²⁹ *Id.* ¶¶ 34 and 46.

³⁰ *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking ¶ 2, 24 FCC Rcd. 6475 (rel. Nov. 5, 2008).

³¹ *Id.* ¶ 7.

³² *Id.* ¶ 22.

IP-in-the-Middle Order

In the *IP-in-the-Middle Order*, the FCC concluded that AT&T's IP-in-the-middle interexchange service, which routed voice traffic over AT&T's Internet backbone, qualified as a telecommunications service because users of that service "obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files."³³ The FCC also concluded that AT&T must pay access charges for its IP-in-the-middle service because that service "imposes the same burdens on the local exchange as do circuit-switched interexchange calls."³⁴ The FCC limited this decision to an interexchange service that (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology to transport the call.³⁵

Time Warner Order

In the *Time Warner Order*, the FCC concluded that wholesale carriers are entitled to interconnect and exchange traffic with ILECs when providing services to other service providers, including VoIP providers, pursuant to FTA § 251.³⁶ In reaching this conclusion, the FCC found that the regulatory classification of the service offered to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under FTA § 251.³⁷ Time Warner noted that, under the wholesale/retail provider relationship described in its petition, the wholesale carriers assumed responsibility for compensating the ILEC for

³³ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access charges*, WC 02-361, Order ¶ 12, 19 FCC Rcd. 7457 (rel. Apr. 21, 2004).

³⁴ *Id.* ¶ 15.

³⁵ *Id.* ¶ 1.

³⁶ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC 06-55, DA 07-79, Memorandum Opinion and Order ¶ 1, 22 FCC Rcd. 3513 (rel. Mar. 1, 2007).

³⁷ *Id.* ¶ 15.

termination of traffic between those two parties.³⁸ The FCC adopted this arrangement as an explicit condition of the interconnection rights granted to Time Warner in its order.³⁹

Advanced Services Resale Order

In the *Advanced Services Resale Order*, the FCC concluded that advanced services sold at retail by ILECs to residential and business end-users are subject to the FTA § 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service.⁴⁰ The FCC also concluded, however, that advanced services sold to ISPs for inclusion in a high-speed Internet service offering are inherently different from advanced services made available directly to business and residential end-users and, as such, are not subject to the discounted resale obligations of FTA § 251(c)(4).⁴¹

Relevant Court Decisions

Worldcom v. FCC

In *Worldcom, Inc. v. FCC*, the D.C. Circuit rejected the FCC's reliance upon FTA § 251(g) as the legal basis for the ISP-bound traffic intercarrier compensation rules adopted by the FCC in the ISP Remand Order.⁴² The court found that FTA § 251(g) did not apply to the ISP-bound traffic at issue because there were no pre-FTA compensation rules for that traffic and because the LEC to LEC compensation rules did not involve services provided "to interexchange carriers and information services providers."⁴³

³⁸ *Id.* ¶ 17.

³⁹ *Id.*

⁴⁰ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC 98-147, Second Report and Order ¶ 3, 1999 WL 1016337 (rel. Nov. 9, 1999).

⁴¹ *Id.*

⁴² *Worldcom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002).

⁴³ *Id.*

IV. DISCUSSION OF DPL ISSUES

This Award addresses the issues in the Joint Decision Point List (DPL) filed by the parties on March 29, 2010. Attachment A to the Award is a summary of abbreviations and acronyms. Attachment B to the Award is a DPL matrix containing the Arbitrators' decisions for issues not addressed here. Attachment C to the Award is a matrix containing the Arbitrators' decisions on the definitions to be included in the ICA (DPL issue AT&T GTC-61). The Arbitrators note that AT&T Texas included the definitions matrix in its Initial Brief. In that matrix, AT&T Texas provided a specific argument for each definition and generally cited to relevant testimony. UTEX's support for its position on the definitions was limited to the general statement that its "definitions are wholly compliant with Order No. 27. And they are consistent with law and precise. The same cannot be said about AT&T's." Joint Ex. 1, Joint DPL, at AT&T GTC Issue 61, UTEX Position Statement.

The parties shall file exceptions to this Proposal for Award by October 7, 2010 and shall file replies by October 14, 2010.

Intercarrier Compensation for Traffic Involving UTEX's ESP Customers

DPL Issues: UTEX 2 through 21, 30, 34, and 35 through 46; AT&T NIM-6, NIM 6-8(b), 6-10, 6-11, and 6-15

Executive Summary

The primary intercarrier compensation issue in this docket is whether AT&T Texas may assess access charges upon UTEX for communications involving UTEX's ESP customers. UTEX argues that under the FCC's ESP exemption, the service UTEX provides to its ESP customers is telephone exchange service and is, therefore, not subject to access charges. Alternatively, UTEX asserts that the service it provides to its ESP customers is exchange access, which UTEX jointly provides with AT&T Texas. In any event, UTEX asserts that it does not provide interexchange service and is, therefore, not subject to access charges. AT&T Texas argues that the ESP exemption applies to UTEX's ESP customers but not to UTEX. AT&T Texas asserts, therefore, that the traffic UTEX exchanges with AT&T Texas is subject to standard intercarrier compensation rules, including the access charge rules. AT&T Texas

concludes that, to the extent that UTEX provides interexchange telecommunications service, UTEX is required to pay access charges.

The FCC has exempted ESPs from paying access charges in certain circumstances. This ESP exemption allows ESPs to purchase local business lines and, where applicable, pay special access surcharges instead of paying access charges. As discussed in more detail below, the Arbitrators conclude that AT&T Texas may not assess access charges upon UTEX for communications to or from a UTEX ESP customer that has a point of presence (POP)⁴⁴ in the same local calling area as the calling or called end user served by AT&T Texas.⁴⁵ When UTEX's customer has a POP in the same local calling area as the calling or called end user served by AT&T Texas, it is plain that UTEX is not providing interexchange service and is, therefore, not subject to access charges. Under the ESP exemption, this conclusion is not altered even if UTEX's ESP customer transports the traffic between the local calling area of the calling or called end user served by AT&T Texas and another exchange. The Arbitrators set forth the requirements for this type of traffic, referred to herein as ESP Traffic, in the Requirements for ESP Traffic section of the Award.

The Arbitrators also conclude that interexchange traffic exchanged between the parties that does not qualify as ESP Traffic should be compensated using the ICA's provisions for interexchange traffic, Optional EAS traffic, or FX traffic, as applicable. The Arbitrators discuss the application of these provisions in the Inter-carrier Compensation for Interexchange Traffic That Does Not Qualify as ESP Traffic section of the Award.

Classification of and Compensation for Communications Involving ESPs

UTEX's Position

UTEX argues that it is entitled to special inter-carrier compensation rates that have been established by the FCC or, in some cases, to a bill-and-keep regime, in which it does not owe access charges for the traffic it exchanges with AT&T Texas. UTEX contends that the FCC

⁴⁴ Unless otherwise noted, this Award uses the term "POP" to refer to a physical point where an entity connects its network with the network of either Party.

⁴⁵ With respect to traffic that originates and terminates to end users in the same local calling area, as the term "end user" is defined in the End User Definition section of the Award, the Arbitrators note that such traffic qualifies as Local Traffic under the ICA language approved in connection with DPL issue AT&T NIM 6-1 even if

unambiguously held in the *Time Warner Order*⁴⁶ that CLECs are entitled to interconnect and exchange traffic with incumbent LECs as peers, and the decision expressly permits the transport of traffic using VoIP technology.⁴⁷ According to UTEX, under this ruling UTEX can seek and obtain interconnection – as a LEC – with AT&T Texas for the purpose of mutually exchanging traffic to and from ESPs.

UTEX contends that it is a LEC that provides telecommunications because it provides transmission between UTEX's Internet Gateway Intermediation Point of Presence (IGI-POP) situs and the appropriate AT&T Texas point of interconnection (POI), sends information to the place specified by its users, and does not change the content of any user information.⁴⁸ UTEX states that because it holds itself out as a common carrier under FTA § 153(10), the "telecommunications" it provides becomes a "telecommunications service."⁴⁹ Further, UTEX states that as a LEC, it is primarily engaged in the provision of "telephone exchange service" as defined in FTA § 153(47) and "exchange access service" as defined in FTA § 153(16), in which case UTEX is a joint LEC access provider with AT&T Texas.⁵⁰ UTEX argues that the exchange should be defined as a local access and transport area (LATA) and "telephone exchange service" is service within a LATA and not a narrower local calling scope.⁵¹ In the alternative, UTEX asserts that the service it provides to the ESP should be deemed to be telephone exchange service because it is comparable to services (FX and Optional EAS) that this Commission expressly held were telephone exchange service under part B of the definition in FTA § 153(47).⁵² UTEX argues that even if the definition of telephone exchange service is deemed to represent service within traditional local calling areas, UTEX's service fits the definition, because UTEX has

such traffic is routed through the POP of a UTEX ESP customer located outside the local calling area of the AT&T Texas calling or called end user.

⁴⁶ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC 06-55, DA 07-79, Memorandum Opinion and Order ¶ 1, 22 FCC Rcd. 3513 (rel. Mar. 1, 2007).

⁴⁷ UTEX Initial Br. at 15.

⁴⁸ UTEX Ex. 1, Direct Testimony of Lowell Feldman (Feldman Direct), at 243:22-26.

⁴⁹ *Id.* at 243:27-244:2.

⁵⁰ *Id.* at 243:4-11.

⁵¹ *Id.* at 245:21-247:17.

equipment and transmission facilities that connect to AT&T Texas's switch and they are contained in the same local calling area.⁵³ UTEX claims that all or at least most of its IGI-POP "situs" locations are in the same local calling area as the POI it has established with AT&T Texas for the LATA.⁵⁴

UTEX further states that it has a logical connection to its ESP/New Technology customers' "customer premises equipment," while noting that the connection is not to individual traditional telecommunications end user "handsets" but to "customer premises equipment" as defined under FTA § 153(14).⁵⁵ UTEX states that each customer station (if "station" means something other than a traditional terminal device like a legacy handset) is at the IGI-POP situs location in the LATA.⁵⁶ UTEX explains that under its IGI-POP tariff, the connection to the ESP/New Technology customers' "customer premises equipment" exists at the IGI-POP situs in the relevant LATA.⁵⁷ UTEX states that each of its customers meets UTEX in the LATA and its IGI-POP situs serves as the demarcation point between the customer's system and UTEX's system.⁵⁸ In other words, this point of connection between the ESP/New Technology customers' "customer premises equipment" and the IGI-POP situs is the "originating" or "terminating" location for purposes of intercarrier compensation, though the end points for "jurisdictionalization" may be in different locations, given the inherently non-geographic nature of Internet communications.⁵⁹

UTEX believes that the compensation for "telecommunications" traffic exchanged between two LECs such as UTEX and AT&T Texas is treated under FTA § 251(b)(5), with the consequent FTA § 252(d)(2) treatment if the call is not carved out by FTA § 251(g).⁶⁰ UTEX

⁵² *Id.* at 248:12-249:5.

⁵³ *Id.* at 247:18-248:4.

⁵⁴ *Id.* at 248:4-5.

⁵⁵ *Id.* at 253:7-11.

⁵⁶ *Id.* at 253:14-17.

⁵⁷ *Id.* at 253:11.

⁵⁸ *Id.* at 253:17-19.

⁵⁹ UTEX Reply Br. at 44.

⁶⁰ UTEX Initial Br. at 16.

contends that this logic is confirmed by the D.C. Circuit's decisions in *Bell Atlantic*⁶¹ and *WorldCom*,⁶² and, perhaps more significantly, by the FCC's *Core Mandamus Order*,⁶³ which expressly adopted and implemented this rule.⁶⁴ UTEX argues that the *Core Mandamus Order* settled the issue of intercarrier compensation for traffic exchanged between LECs. According to UTEX, *Core Mandamus* held that ISP-bound traffic is clearly and unambiguously categorized under § 251(b)(5).⁶⁵ UTEX states that the results of *Core Mandamus* must apply symmetrically to traffic originating from the Internet and that a VoIP call from an ESP is merely the mirror image of a call from the PSTN to a dial-up ISP.⁶⁶ UTEX states that its contract language on intercarrier compensation in 2005 proposed "bill and keep" terms except when the traffic is out of balance; then the *ISP Remand* \$0.0007 rate would apply.⁶⁷ However, UTEX believes that the language should be updated to be explicitly consistent with reciprocal FTA § 251(b)(5) terms for voice-embedded Internet communications as contemplated by *Core Mandamus Order*.

UTEX states that it is acting purely as a LEC and does not provide telephone toll or any interexchange service and, therefore, should not be deemed to be an IXC access customer.⁶⁸ Further, UTEX claims that it is not serving either the ultimate user or the ESP that serves that user but instead provides service to another ESP that aggregates enhanced traffic, provides its own further enhancement and then connects to UTEX in the appropriate LATA and often in the same local calling area as the POI between UTEX and AT&T Texas.

According to UTEX, AT&T Texas argues that, on a call-by-call basis, if UTEX is "acting" like an IXC on that call, then access charges pursuant to FCC Rule 69.5(b) apply to UTEX.⁶⁹ UTEX states, however, that this argument is predicated on the premise that UTEX is or acts like

⁶¹ *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

⁶² *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

⁶³ *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475 (rel. Nov. 5, 2008).

⁶⁴ UTEX Initial Br. at 16.

⁶⁵ UTEX Reply Br. at 20.

⁶⁶ *Id.* at 21; UTEX Initial Br. at 25.

⁶⁷ UTEX Reply Br. at 21-22.

⁶⁸ UTEX Initial Br. at 27-28.

⁶⁹ UTEX Reply Br. at 9.

an IXC. UTEX contends there is not a shred of evidence in the record that UTEX is or acts like an IXC under the law nor has AT&T Texas introduced any evidence apart from suggestive references to UTEX “acting” like an IXC.⁷⁰ UTEX argues that under FCC Rule 69.5(b) and P.U.C. SUBST. R. 26.5(107), an IXC must necessarily provide transport between local exchanges.⁷¹ UTEX further argues that PUC SUBST. R. 26.5(107) specifically requires that an IXC transport “intrastate telecommunications messages between local exchanges.”⁷² According to UTEX, AT&T Texas has not demonstrated, nor even claimed, that UTEX does or would provide transport between exchanges for any of the voice-embedded Internet communication call scenarios UTEX intends to support under this ICA.⁷³ UTEX states that its IGI-POP tariff explicitly stipulates that this service is a LEC-provided telephone exchange service and is expressly not IXC telephone toll service and that UTEX expressly prohibits any IXC from purchasing that service, and limits that service in a very specific way that makes it impossible for UTEX to provide any “interexchange” transport.⁷⁴

In an attachment struck by the Arbitrators in Order No. 30, UTEX proposes language that segregates all traffic exchanged with AT&T Texas into functional “trunk groups” that tie the routing and trunking of traffic to the rating of each trunk group.⁷⁵ These groups are (1) Retail/POTS End User Traffic; (2) New Technology/Wholesale End User Traffic; (3) Jointly Provided IXC Traffic; (4) Affiliated Transit Traffic; and (5) Unaffiliated Transit Traffic. UTEX states that all groups except Jointly Provided IXC Traffic would be § 251(b)(5) trunk groups. UTEX proposes that groups (1) and (2) described above have a reciprocal obligation of \$0.0007 per minute, and group (5) have a reciprocal obligation of \$0.00096 (which is the transit rate approved in Docket No. 28821). UTEX proposes that group (4) should have no compensation. Finally, for the Jointly Provided IXC traffic (group (3)), UTEX proposes the application of

⁷⁰ *Id.* at 9-10.

⁷¹ *Id.* at 10.

⁷² *Id.* at 12-13.

⁷³ *Id.* at 10.

⁷⁴ *Id.*

⁷⁵ UTEX Initial Br. at 43-46.

MECAB/MECOD.⁷⁶ UTEX also proposes ICA language to resolve concerns of misrouted traffic if either party believes that a call is being misrouted to the detriment of any party to the ICA.

AT&T Texas's Position

AT&T Texas argues that the traffic UTEX exchanges with it is subject to standard intercarrier compensation rules. AT&T Texas states that its proposed ICA language on intercarrier compensation reflects the same compensation scheme the Commission approved in 2005 in Docket No. 28821 and embodies the compensation scheme under which virtually all other LECs in the state operate.⁷⁷ AT&T Texas rejects the proposal by UTEX that would eliminate recovery of switched access charges for VoIP traffic. In addition to the lack of any system to verify and differentiate VoIP traffic from non-VoIP traffic, AT&T Texas argues that the premise for UTEX's argument is wrong.

AT&T Texas points out that when the FCC refused to preempt the Commission's jurisdiction over this arbitration, the FCC held that "uncertainty in the law because the [FCC] has not addressed a particular question" was of no moment.⁷⁸ AT&T Texas argues that in directing the Commission to "proceed to arbitrate this interconnection agreement in a timely manner, *relying on existing law*," the FCC made clear that it has not yet promulgated any special compensation rules for VoIP, and the Commission is to address such matters in this arbitration by applying existing law.

AT&T Texas states that the FCC's *Time Warner Order* held that the classification of VoIP traffic as an information service or as a telecommunications service is irrelevant to whether a "wholesale telecommunications carrier" providing service to VoIP providers is entitled to enter into an ICA that provides for exchanging such traffic with an incumbent carrier like AT&T Texas.⁷⁹ AT&T Texas states that the FCC's conclusion was based on the premise that a

⁷⁶ MECAB means Multiple Exchange Carrier Access Billing, and MECOD means Multiple Exchange Carrier Ordering and Design. UTEX Ex. 4, Feldman Rebuttal Exhibits, at 79-208 (MECAB Guidelines). MECAB is a document that contains guidelines recommended by the Ordering and Billing Forum (OBF) for the billing of access services to an IXC by two or more LECs. *Id.* at 92. MECOD is a document that contains OBF-developed guidelines for establishing methods for processing orders for access service that is to be provided to an IXC by two or more telecommunications providers. UTEX Ex. 26, MECOD Guidelines, at 1-1 to 1-3.

⁷⁷ AT&T Texas Initial Br. at 7-8.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 8-9.

wholesale carrier like UTEX is a telecommunications carrier providing telecommunications service, even if an underlying VoIP provider is providing information services. AT&T Texas notes the FCC in the *Time Warner Order* required the telecommunications carrier to assume “responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement,” although AT&T Texas acknowledges that the FCC refused to “prejudge the Commission's determination of what compensation is appropriate.”

AT&T Texas posits that unless and until the FCC changes the compensation system pursuant to its powers under FTA §§ 201 and 251(g), interexchange VoIP traffic, like all other interexchange traffic, remains subject to switched access charges.⁸⁰ AT&T Texas notes that FCC Rule 69.5(b) states, “Carrier's carrier charges [*i.e.*, access charges] shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.”⁸¹ According to AT&T Texas, neither FCC Rule 69.5(b) nor AT&T Texas's switched access tariffs turn upon the particular format in which an interexchange call is carried and, to the contrary, they apply whenever an “interexchange carrier” uses AT&T Texas's local exchange facilities in the provision of interstate telecommunications services (or, in the case of AT&T Texas's state switched access tariff, in the provision of intrastate interexchange service). AT&T Texas concludes that to the extent UTEX acts as an IXC by providing interexchange telecommunications service such as the transport of VoIP traffic between local exchanges, it is subject to access charges under the FCC's current rules.

AT&T Texas rejects UTEX's position that the FCC's *Core Mandamus Order* clearly changed the law so as to authorize a new compensation regime.⁸² AT&T Texas argues that in ¶ 16 of the *Core Mandamus Order* – the key paragraph UTEX relies on – the FCC addressed special intercarrier compensation rates for exchange of ISP-bound traffic where the calling and called parties reside in the same exchange. AT&T Texas concludes that the FCC did not address interexchange traffic at all in the *Core Mandamus Order*.

AT&T Texas responds to UTEX's position that “VoIP is merely ‘ISP-bound’ traffic in reverse” and, therefore, should have the same exemption by pointing out that it is an argument

⁸⁰ *Id.* at 8.

⁸¹ *Id.* at 9-10

for UTEX to make to the FCC, not to this Commission.⁸³ In asking this Commission to unilaterally expand a federal exemption beyond its current scope, AT&T Texas states that UTEX is asking the Commission to exceed its authority under FTA §§ 251 and 252 and to violate the FCC's explicit directive that the Commission conduct this arbitration in accordance with *existing* law.

AT&T Texas states that it is important to determine the jurisdiction of the call before the appropriate intercarrier compensation can be applied.⁸⁴ According to AT&T Texas, the jurisdiction of the call is established by looking at the geographic location of the end users at the originating and terminating points of the call to determine whether the call is interstate or intrastate and whether it is interLATA or intraLATA.⁸⁵ AT&T Texas points out that while jurisdiction provides initial direction for intercarrier compensation, certain call types receive unique compensation treatment.⁸⁶ AT&T Texas explains that if the call satisfies the definition of ISP-bound traffic, then the FCC's compensation plan specific to ISP-bound traffic applies. Otherwise, interstate calls are subject to federal switched access charges and intrastate interLATA calls are subject to state switched access charges.⁸⁷

According to AT&T Texas, if the call is intraLATA and if the call originates and terminates within a common mandatory local calling area, then the call is subject to reciprocal compensation under FTA § 251(b)(5).⁸⁸ AT&T Texas states that if the call terminates outside the mandatory local calling area of the end user and if it is a foreign exchange (FX) call, then the Commission-established compensation of "bill and keep" applies.⁸⁹ On the other hand, if the call originates and terminates within an optional EAS, then the rate of \$.002487 per minute of use

⁸² AT&T Texas Reply Br. at 7-8.

⁸³ AT&T Texas Reply Br. at 11-12.

⁸⁴ AT&T Texas Ex. 15, Direct Testimony of J. Scott McPhee (McPhee Direct), at 50:16-17.

⁸⁵ *Id.* at 50:17-21.

⁸⁶ *Id.* at 50:21-51:2.

⁸⁷ *Id.* at 51:3-6.

⁸⁸ *Id.* at 51:7-9.

⁸⁹ *Id.* at 51:9-12.

previously approved by the Commission for optional EAS applies.⁹⁰ Otherwise, intraLATA calls are subject to state switched access charges.⁹¹

Application of ESP Exemption

UTEX's Position

UTEX asserts that it is entitled to take advantage of the ESP exemption for traffic to or from an ESP and disputes AT&T Texas's characterization that UTEX is attempting to avoid all compensation for ESP traffic.⁹² UTEX states that the evidence in the record shows that UTEX has updated its 2005 proposed ICA language to specifically adopt the mutual compensation results of the FCC's *Core Mandamus Order*, which would subject ESP traffic to FTA § 251(b)(5) compensation.

UTEX asserts that the ESP exemption provides that when an ESP asserts its right to the exemption and purchases service from UTEX's IGI-POP tariff, the ESP is specifically purchasing a telephone exchange service rather than an exchange access service.⁹³ UTEX states that because it is a LEC and a requesting carrier under the Act, the traffic between the two LECs is "telecommunications" and is therefore FTA § 251(b)(5) traffic unless it is "carved out" by FTA § 251(g), in which case it must be jointly provided access. UTEX cites the decision in *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) as the basis for its assertion that FTA § 251(g) is limited in its application to the ILEC's pre-Act obligations, and even more specifically the legacy exchange access regime, and applies neither to FTA § 251(b)(5) traffic nor the ESP exemption.⁹⁴ UTEX also claims that *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-0397 (D.D.C. Feb. 18, 2010) concluded that the ESP exemption applied to IP-originated traffic.⁹⁵ UTEX further claims that it is not attempting to re-litigate Docket No. 33323, contrary to AT&T Texas's assertion, but is asking the Arbitrators simply to

⁹⁰ *Id.* at 77:1-20.

⁹¹ *Id.* at 51:12-13.

⁹² UTEX Reply Br. at 25-26.

⁹³ *Id.* at 27-28.

⁹⁴ UTEX Initial Br. at 23.

⁹⁵ Tr. at 338:25-339:5 (Apr. 14, 2010).

arbitrate a replacement ICA pursuant to UTEX's unique terms and facts, including UTEX's business plans.⁹⁶

UTEX also rejects any attempt by AT&T Texas to characterize the ESP exemption as applying only to calls bound to the ESP. UTEX argues that the FCC expressly recognized the bidirectional nature of ESP traffic, when it observed that ESPs "may use incumbent LEC facilities to originate and terminate interstate calls."⁹⁷ According to UTEX, the Modification of Final Judgment⁹⁸ definition of "information access" recognized the same thing: ESPs have always launched calls to the PSTN, in addition to receiving calls from the PSTN.⁹⁹

With respect to AT&T Texas's argument that the FCC did not extend the ESP exemption to carriers that provide interstate services to ESPs as IXC, UTEX points out that the FCC decision cited by AT&T Texas, *Northwestern Bell Order*,¹⁰⁰ does not stand for the proposition that an ILEC can assess access charges against another LEC that is providing service to an end user ESP and hands off traffic to the ILEC for termination.¹⁰¹ UTEX opines that the decision involved a claim that access charges should not apply when an ESP purchases a telephone toll service from an IXC.¹⁰² UTEX points out that there was no contest over whether the entity involved was in fact an IXC and that the FCC correctly ruled that access charges were due under FCC Rule 69.5(b).¹⁰³ UTEX does not claim that any IXC should be relieved of any access burden merely because the IXC's telephone toll customer happens to be an ESP.¹⁰⁴ However, UTEX contends that one LEC cannot impose originating or terminating access charges on another LEC for traffic

⁹⁶ UTEX Reply Br. at 27-28.

⁹⁷ UTEX Ex. 1, Feldman Direct, at 259:5-6.

⁹⁸ *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982).

⁹⁹ UTEX Ex. 1, Feldman Direct, at 259:6-8.

¹⁰⁰ *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, CC 86-1, Memorandum Opinion and Order ¶ 21, 2 FCC Record 5986 (rel. Oct. 5, 1987), *vacated as moot by* 7 FCC Rcd. 5644 (rel. Sept. 4, 1992).

¹⁰¹ UTEX Ex. 1, Feldman Direct, at 257:7-10.

¹⁰² *Id.* at 257:10-12.

¹⁰³ *Id.* at 257:12-13.

¹⁰⁴ *Id.* at 257:13-15.

that is eligible for the ESP exemption, because nobody (neither the LECs nor the ESP) is providing telephone toll service to anyone, so exchange access simply never enters the picture.¹⁰⁵

UTEX distinguishes, on a number of grounds, the *GNAPS IV* decision¹⁰⁶ that AT&T Texas relies on. UTEX argues that the decision is notable for the continued bad actions taken by the principals of GNAPS.¹⁰⁷ UTEX states that AT&T Texas's witnesses did not accuse UTEX of wrongdoing and that UTEX's 2010 refresh language included misrouting language. UTEX also states that GNAPS waived many of its rights, while UTEX has preserved those rights. According to UTEX, *GNAPS IV* merely affirmed the proposition that state commissions retain the authority to define "telephone exchange" under FTA § 153(47)(A), and does not represent a decision that state commissions are preempted from addressing intercarrier compensation issues. State commissions also may determine whether something is "comparable service" under FTA § 153(47)(B). UTEX states that it presented uncontested evidence that it is providing telephone exchange service and is not providing telephone toll service. UTEX stated that it is a LEC, while GNAPS was an IXC, at least in part.

AT&T Texas's Position

While the FCC has created special compensation rates for ESPs, AT&T Texas argues that UTEX is not entitled to take advantage of those rates. AT&T Texas states that the ESP exemption was created by the FCC in 1983 when the FCC created the access charge regime to govern payments from interexchange carriers to local exchange carriers for access to and use of the LECs' networks.¹⁰⁸ AT&T Texas explains that an ESP, just like a long distance carrier, may use the local networks of LECs to access the ESP's customers and, like a long distance carrier, the ESP may then transport that traffic outside the local calling area. AT&T Texas states that the FCC concluded in 1983, as a policy matter, to exempt ESPs from the payment of access charges for using LEC networks and instead to require that ESPs be treated like end-use business customers. AT&T Texas notes that the exemption from access charges is a limited one, and the FCC reiterated the limited nature of this exemption in its subsequent access charge orders.

¹⁰⁵ *Id.* at 257:15-18.

¹⁰⁶ *Global NAPS, Inc. v. Verizon New England, Inc.*, Nos. 09-1308 & 09-1309 (1st Cir. Apr. 30, 2010).

¹⁰⁷ UTEX Reply Br. at 39-42.

¹⁰⁸ AT&T Texas Initial Br. at 13-14.

AT&T Texas concludes that the FCC's orders apply the ESP exemption to ESPs and do not exempt downstream carriers such as UTEX from paying reciprocal compensation and access charges.¹⁰⁹ AT&T Texas cites the FCC's determination in the *Northwestern Bell Order*,¹¹⁰ which stated that under the ESP exemption, "enhanced service providers are treated as end users for purposes of [the FCC's] access charge rules" and thus pay end-user charges rather than access charges, but "[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers." According to AT&T Texas, a telecommunications carrier such as UTEX that delivers interexchange voice telephone calls for termination on AT&T Texas's network is acting as an interexchange carrier providing interstate telecommunications and therefore is subject to access charges under FCC Rule 69.5(b), just like an ordinary long distance carrier.¹¹¹

AT&T Texas offers additional reasons for its position that the ESP exemption does not apply to UTEX.¹¹² First, UTEX is not using a retail business product as the ESP exemption allows, but instead uses a local/intraLATA toll trunk, which end users do not purchase. Second, as the FCC has explained, "enhanced service providers (ESPs) should not be subjected to originating access charges for ESP-bound traffic." But UTEX's alleged VoIP traffic is not ESP-bound. It is PSTN-bound; it is intended for termination on the PSTN to AT&T Texas's and third party carriers' end users, just like an ordinary long-distance call, according to AT&T Texas. Third, the ESP exemption applies only when the ESP is providing enhanced or information services to its subscribers. AT&T Texas points out that UTEX uses AT&T Texas's switching to deliver plain old circuit-switched telephone calls to non-VoIP end users. Therefore, the terminating end user receives nothing more than a traditional telephone service and not an information service. Finally, the ESP exemption applies not to CLECs or IXC's, but to ESPs. According to AT&T Texas, the entire point of the exemption is to allow ESPs to provide enhanced services to their own end users via a retail product without incurring access charges.

¹⁰⁹ *Id.* at 15.

¹¹⁰ *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, CC 86-1, Memorandum Opinion and Order ¶ 21, 2 FCC Record 5986 (rel. Oct. 5, 1987), *vacated as moot* by 7 FCC Rcd. 5644 (rel. Sept. 4, 1992).

¹¹¹ AT&T Texas Initial Br. at 15.

¹¹² AT&T Texas Ex. 15, McPhee Direct, at 86:21-87:19.

AT&T Texas states that the federal district court in California in a GNAPs case¹¹³ addressed and rejected an attempt to extend the ESP exemption to carriers like UTEX, reasoning that the ESP exemption did not apply because “GNAPs is not a VoIP provider, but a *VoIP carrier*” and that the ESP “exemption only applies to ESPs, not to carriers of ESP traffic.”¹¹⁴ AT&T Texas also states that the court recognized that the ESP exemption applies to ISP-bound traffic and not to PSTN-bound traffic.

AT&T Texas argues that the ICA should not include any specialized terms for compensation for “ESP traffic.”¹¹⁵ Instead, the compensation for ESP traffic should be the same as for all traditional calls originating or terminating on AT&T Texas’s network. Specifically, under AT&T Texas’s proposed language, a call to or from an ESP that originates and terminates in the same Local Calling Area would be subject to reciprocal compensation, like a traditional call.¹¹⁶ An interexchange call to or from an ESP (*i.e.*, a call that originates and terminates in different local exchanges) would be subject to access charges.¹¹⁷ AT&T Texas argues that the FCC’s access charge rule, 47 C.F.R. § 69.5(b), applies to a telecommunications carrier such as UTEX that provides service to ESPs or VoIP providers.¹¹⁸ To the extent that a telecommunications carrier provides interstate transport between different local exchanges, the carrier is by definition an “interexchange carrier” providing “interstate . . . telecommunications services” pursuant to 47 C.F.R. § 69.5(b).¹¹⁹ AT&T Texas further states that telephone toll service is interexchange service pursuant to 47 C.F.R. § 64.4001(d).¹²⁰

AT&T Texas rejects UTEX’s argument that the “legacy exchange access regime *never* applied [to] ESP traffic.”¹²¹ AT&T Texas contends that the court decision that UTEX relies on, *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002), does not stand for the proposition

¹¹³ *Global Naps California, Inc. v. Public Utils. Comm’n of California*, No. CV 09-1927 ODW (PJWx), Order re Motions to Dismiss for Failure to State a Claim at 11 (April 27, 2010).

¹¹⁴ AT&T Texas Reply Br. at 11.

¹¹⁵ AT&T Texas Ex. 15, McPhee Direct, at 93:20-22.

¹¹⁶ *Id.* at 93:17-18.

¹¹⁷ *Id.* at 93:18-20.

¹¹⁸ *Id.* at 92:8-13.

¹¹⁹ *Id.* at 93:9-14.

¹²⁰ AT&T Texas Reply Br. at 7.

¹²¹ *Id.* at 7.

that switched access charges have never applied to “ESP traffic.”¹²² In fact, AT&T Texas states that the D.C. Circuit elsewhere recognized that FTA § 251(g) addresses “services provided to interexchange carriers *and information service providers*.” AT&T Texas refers to a decision issued by the United States Court of Appeals for the First Circuit, *Global Naps, Inc. v. Verizon New England, Inc.*, ___ F.3d ___, 2010 WL 1713240 at *1 (1st Cir. Apr. 29, 2010), which it argues supports its position.¹²³ The court rejected GNAPs’ argument that the *Core Mandamus Order* preempted the state commission’s authority to impose access charges for interexchange ISP traffic, by reasoning that while the *Core Mandamus Order* “did describe ISP-bound traffic as ‘interstate’ and ‘interexchange,’” those statements did “not mean the FCC was preempting interexchange fees.” The court also held that “the FCC has not exercised jurisdiction over interexchange traffic. Our conclusion that the FCC preempted only state regulation of *local* ISP traffic remains unaffected.” AT&T Texas also cites another decision by a California district court, *Global Naps California, Inc. v. Public Utils. Comm’n of California*,¹²⁴ where, AT&T Texas claims, the court rejected GNAPs’ claim that state commissions were preempted from imposing access charges on VoIP traffic and concluded that access charges applied because GNAPs was a carrier and its traffic terminated on the PSTN.¹²⁵ AT&T Texas argues that the traffic to be exchanged between UTEX and AT&T Texas will be no different: UTEX is a carrier – not a VoIP provider – and the traffic it claims it will deliver to AT&T Texas will terminate on the PSTN.

AT&T Texas contends that UTEX’s proposed language is similar to the disputed ICA language in Docket No. 33323, and UTEX attempts to avoid the imposition of access charges on VoIP traffic by arguing that all of its traffic should be covered by the ESP exemption.¹²⁶ The proposed language referred to by AT&T Texas requires no intercarrier compensation for traffic that is destined for or received from ESPs. AT&T Texas notes that in Docket No. 33323, the Commission properly limited this exemption to local traffic – *i.e.*, traffic that originates and

¹²² *Id.* at 8.

¹²³ *Id.* at 9-10.

¹²⁴ *Global Naps California, Inc. v. Public Utils. Comm’n of California*, No. CV 09-1927 ODW (PJWx), Order re Motions to Dismiss for Failure to State a Claim at 11 (April 27, 2010).

¹²⁵ AT&T Texas Reply Br. at 10.

¹²⁶ AT&T Texas Initial Br. at 10.

terminates in the same local exchange. AT&T Texas claims that UTEX's definition of ESP traffic is exceptionally broad and appears to encompass multiple forms of traffic, including PSTN-IP-PSTN, IP-PSTN, ISP-bound traffic, and even traditional telephone calls to an ESP.¹²⁷ AT&T Texas states that when UTEX's proposed language requiring no compensation for traffic that either originates from or terminates to an ESP is taken together with the Commission's interpretation of UTEX's proposed language in Docket No. 33323, that mere intermediate involvement by an ESP would suffice for the traffic to qualify as ESP traffic, the result would be a no compensation arrangement for millions of minutes of traffic UTEX delivers to AT&T Texas. AT&T Texas urges the Commission to reach the same conclusion that it did in Docket No. 33323 and not allow UTEX to evade switched access charges.

AT&T Texas states that the *PAETEC* decision¹²⁸ cited by UTEX is unpersuasive, wrong, and distinguishable.¹²⁹ AT&T Texas states that *PAETEC* is not consistent with the FCC's *Time Warner* decision, which held that wholesale transport by a carrier is telecommunications service irrespective of the classification of the VoIP service provided to retail end users. AT&T Texas states that *PAETEC* did not rely on any FCC orders to support its holding, because there are not any, and instead relied on two district court decisions. AT&T Texas states that one of those decisions did not even address access charges and the other predated the FCC's *Time Warner Order*. AT&T Texas does not agree with *PAETEC*'s conclusion that there were no pre-Act obligations subject to FTA § 251(g) for this type of traffic. Finally, AT&T Texas notes that an arbitrator in Kansas rejected *PAETEC* because it "may be incorrect with its interpretations of several federal court cases it cited."

AT&T Texas states that the *PAETEC* court has authorized an "immediate appeal" of its order.¹³⁰ AT&T Texas also states that *PAETEC* does not support the positions for which UTEX cites it, because that decision involved tariffs rather than a § 251/252 ICA and because UTEX is a CLEC, not an ESP.

¹²⁷ *Id.* at 12.

¹²⁸ *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-0397 (D.D.C. Feb. 18, 2010).

¹²⁹ AT&T Texas Initial Br. at 19-21.

¹³⁰ AT&T Texas Reply Br. at 12.

Other State Commission Decisions

UTEX's Position

UTEX argues that the unique and uncontested facts of this arbitration demand a different result than the other state commission decisions.¹³¹ UTEX states that in all of the cited cases except Missouri, each respective state commission expressly held that the competitive carrier's service was not "telephone exchange service" or "exchange access service," but was instead "telephone toll service." As a result, the traffic was classified as traffic under FTA § 251(g) and therefore access charges applied. In Missouri, UTEX notes, the state commission applied federal law and held that FTA § 251(b)(5) did in fact apply, which was subsequently overruled by the Missouri legislature.

UTEX points out that in all of the state commission decisions cited by AT&T Texas, the competitive carrier voluntarily agreed to be treated as, or was held to be, an IXC based on the facts and circumstances peculiar to its own business.¹³² On the other hand, UTEX has always categorically rejected IXC classification and has developed its own substitutable, competitive tariffed offering to AT&T Texas's "switched access." UTEX notes that in some of the state commission decisions, the CLEC connected to its ESP customer across state boundaries, and would itself carry the communications across LATAs, which constituted interexchange transport.¹³³ None of those state cases held that access charges can be assessed against a CLEC that does not provide telephone toll service and is solely fulfilling a LEC function, *e.g.*, telephone exchange service or exchange access service, which is the factual situation in this arbitration, according to UTEX.

UTEX argues that the Ohio commission's reliance on CPN for determining intercarrier compensation has been rejected by this Commission in Docket No. 24015.¹³⁴ UTEX contends that the Commission ruled in that docket that the relevant point *for intercarrier compensation purposes* is the physical location where the ESP connects to the LEC. In addition, contrary to AT&T Texas's ICA language for no-CPN traffic, UTEX states that the Ohio commission ruled

¹³¹ UTEX Reply Br. at 38.

¹³² *Id.* at 39.

¹³³ *Id.* at 42-43.

¹³⁴ *Id.* at 44.

that IP-based “no CPN” traffic is subject to *interstate* access, not *intrastate* access charges. UTEX also argues that the Ohio commission incorrectly relied on an aspirational policy statement in the 2005 FCC NPRM that went with a proposed FCC rule that was never actually adopted.

AT&T Texas’s Position

AT&T Texas claims that almost every state commission that has considered the issue has held that, until the FCC says otherwise, switched access charges apply to VoIP traffic.¹³⁵ AT&T Texas cites decisions by the Kansas Corporation Commission, Public Utilities Commission of Ohio, California Public Utilities Commission, and Illinois Commerce Commission. The Kansas commission concluded in 2005 that “the current state of federal law is that access charges apply to interexchange traffic, barring a specific exemption,” and the ESP “exemption applies to the information service provider, not to carriers ... that provide service to ESPs and other customers.” On April 23, 2010, a Kansas commission arbitrator concluded, consistent with the 2005 Kansas commission determination, that “if the ESP contracts with a third party to transport the VoIP calls, like Global Crossing, that third party’s interexchange transport of the VoIP calls is subject to access charges assessed by an ILEC, like AT&T.” Similarly, in February 2009, the Illinois commission concluded that the ESP exemption does not apply “to traffic that is delivered from ESPs.” Rather, the exemption applies to ESPs themselves but not to the carriers serving the ESPs. The Ohio commission, in the 2006 *TelCove Arbitration Decision*, determined that the physical location of the called and calling parties is the deciding factor in determining the jurisdiction of a call for routing and compensation purposes. The Ohio commission’s decision also relied on the technologically neutral intercarrier compensation and trunking guiding principles articulated by the FCC in its NPRM relating to IP-enabled service, which states that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network, and that the cost of the PSTN should be borne equitably among those that use it in similar ways.

¹³⁵ AT&T Texas Initial Br. at 16-19.

The California commission concluded in 2006 that "not all information or enhanced services qualify for the ESP exemption."¹³⁶ Rather, the California commission concluded that the exemption "applies only to an ESP's use of the PSTN as a link between the ESP and its subscribers," and thus concluded that the exemption does not apply to traffic from an ESP in VoIP format that is terminated on the PSTN like any other call. In Missouri, although the commission determined that VoIP traffic should be exchanged over the same interexchange trunk groups used to exchange local traffic, the Missouri legislature overruled that Missouri commission decision by a statute requiring that "Parties shall exchange interconnected voice over Internet protocol traffic . . . subject to the appropriate exchange access charges to the same extent that telecommunications services are subject to such charges."

Use of CPN to Determine Jurisdiction of Traffic

UTEX's Position

UTEX rejects AT&T Texas's approach of jurisdictionalizing calls not on a carrier-by-carrier basis, but on a call-by-call basis using CPN.¹³⁷ UTEX also objects to AT&T Texas's insistence that the CPN parameter information should be a geographic number, arguing that the result of such an approach would be that the CPN is treated as "invalid" and "no CPN" if the information is a non-geographic number even if the number is, in fact, a dialable, routable North American Numbering Plan (NANP) address. UTEX states that users of Internet technologies may freely choose the number they represent to the network, and a user who has been assigned a Texas CPN may freely and often unknowingly represent that CPN while making a call from a location outside Texas. UTEX cited the FCC's *Vonage Order* and various court decisions to support its argument that with VoIP, traditional phone numbers have absolutely no geographic relevance.

UTEX contends that AT&T Texas's approach to the use of CPN as a rating tool depends on whether it serves AT&T Texas's interests.¹³⁸ UTEX claims that in Docket No. 24015, which established "bill and keep" as the intercarrier compensation for FX traffic, AT&T Texas's position was inconsistent with its advocacy for number-based rating in this proceeding. UTEX claims that AT&T Texas's position in Docket No. 24015 was that number-based rating should

¹³⁶*Id.* at 18-19.

¹³⁷ UTEX Initial Br. at 17-21.

not control when AT&T Texas originates a call to a “local” number, but the called party is not actually present in the same area, such as with CLEC-provided FX to ESPs or legacy end users. UTEX questions the basis for AT&T Texas’s position that phone numbers should be used for jurisdictionalization when AT&T Texas agrees that for VoIP, as for FX, phone numbers are not a reliable indicator of geography or exchange location. UTEX concludes that AT&T Texas seeks to secure “bill and keep” or the FCC \$0.0007 rate for all calls where it is responsible for payment, to minimize its intercarrier expense, but it wants to recover access for everything it terminates (and even some of the traffic it originates) to maximize its intercarrier revenue. UTEX further argues that CPN representation by its new technology customers that do not fit the traditional CPN parameters is not a statistical anomaly as AT&T Texas believes, but is instead the reality of how new technology creates substitutes for PSTN functions, and new technology customers form the core of UTEX’s business.

AT&T Texas’s Position

AT&T Texas proposes language in § 2.1 of Attachment 6 to NIM in the proposed ICA that states, “each Party shall provide Calling Party Number (“CPN”) as defined in 47 C.F.R. § 64.1600(c).”¹³⁹ AT&T Texas states that UTEX, on the other hand, opposes this language and proposes merely to state in § 2.2 that “[e]ach Party will include in the information transmitted to the other for each call being terminated on the other’s network (where available), the originating Calling Party Number (CPN).”¹⁴⁰ AT&T Texas also proposes language in § 2.3 of Attachment 6 to NIM that tracks the language quoted from Docket No. 28821, imposing intraLATA toll charges on traffic passed without CPN in the event that less than 90% of the traffic includes CPN.¹⁴¹ AT&T Texas concludes that the 90/10 CPN requirement is a reasonable, well-established requirement.¹⁴² AT&T Texas notes that other state commissions often impose that ratio and some even require a 95/5 ratio.¹⁴³ AT&T Texas argues that UTEX has provided no

¹³⁸ *Id.* at 22 -24.

¹³⁹ AT&T Texas Initial Br. at 22.

¹⁴⁰ *Id.* at 23.

¹⁴¹ *Id.*

¹⁴² *Id.* at 24.

¹⁴³ *Id.*

evidence to support deviating from the 90/10 CPN requirement the Commission has required in AT&T Texas ICAs since it first approved it in the T2A more than a decade ago.¹⁴⁴

AT&T Texas expressed concern that, based on the testimony of UTEX witness Mr. Feldman,¹⁴⁵ VoIP traffic often does not have CPN.¹⁴⁶ Thus, UTEX's proposal to provide CPN if available would excuse UTEX from providing CPN on VoIP calls and would thereby prevent AT&T Texas from being able to jurisdictionalize those calls. AT&T Texas contends that UTEX's proposed language would therefore become a means to pass interexchange traffic, which may or may not be VoIP traffic, without paying access charges and would encourage traffic washing, since UTEX (or any carrier that might adopt the UTEX Agreement) would have no obligation to prevent competitive access providers or IXC's that route traffic to UTEX from stripping the CPN from the call.

AT&T Texas argues that the Commission should reject UTEX's alternative, indirect mechanism for avoiding compensation for VoIP traffic by altering long-established requirements for providing CPN.¹⁴⁷ AT&T Texas states that both the Commission and the FCC have recognized the importance of requiring carriers to send CPN to ensure that access charges are not avoided improperly and to ensure accuracy in billing. AT&T Texas pointed out that in Docket No. 28821, the Commission determined that requiring CPN was critical to protecting against regulatory arbitrage. Despite the concerns raised by UTEX regarding the unreliability of CPN as a true indicator of geographic location of the end user, AT&T Texas contends that UTEX itself claims to have used CPN as the best evidence it could find to trace back the originating carrier of the calls UTEX routed to AT&T Texas for termination.¹⁴⁸

AT&T Texas responds to UTEX's argument that the FCC's *Vonage Order* shows that "with VoIP, traditional phone numbers have absolutely no geographic relevance" by asserting that *Vonage* involved purely VoIP calls for which traditional phones are not needed.¹⁴⁹ According to AT&T Texas, the same cannot be said for VoIP-originated calls to end users on the PSTN,

¹⁴⁴ *Id.*

¹⁴⁵ Tr. at 357:6-10; 365:3-5 (Apr. 14, 2010) (discussing Skype Calls).

¹⁴⁶ AT&T Texas Initial Br. at 23.

¹⁴⁷ AT&T Initial Br. at 22-23.

¹⁴⁸ *Id.* at 24.

¹⁴⁹ AT&T Texas Reply Br. at 12-13.

because VoIP users who want to both place calls to and receive calls from end users on the PSTN have to have CPNs so that the PSTN users can call them back.¹⁵⁰ In addition, such VoIP users typically do have CPNs because their VoIP providers partner with a CLEC that can provide the customers with phone numbers and route their traffic into and out of the PSTN.¹⁵¹ AT&T Texas concludes that *Vonage* provides no basis for eliminating the CPN requirement for calls to and from the PSTN – and all traffic to be exchanged between UTEX and AT&T Texas will be either to or from the PSTN.

AT&T Texas rejects UTEX's suggestion that the evidence in this case has established that CPNs are an unreliable indicator of the geographic locations of the calling and called parties.¹⁵² AT&T Texas admits that CPN can be an inaccurate indicator of actual geographic locations but also noted that those inaccuracies can go both ways – treating some local calls as interexchange and some interexchange calls as local and contended that there was no evidence that the inaccurately characterized local calls did not offset the inaccurately characterized interexchange calls. More importantly, AT&T Texas notes, the current intercarrier compensation rules do depend on geography and CPNs, even if occasionally imperfect, are the best evidence available of parties' locations. AT&T Texas also argues that UTEX provided *no* evidence that the 90/10 CPN requirement – which affords a ten percent cushion to accommodate unjurisdictionalized calls – was inadequate to take care of any possible imbalances.

AT&T Texas rejects UTEX's claim that the Commission's decision on the treatment of FX traffic was a "self-serving exception" created by AT&T Texas. AT&T Texas notes that the decision applies to CLEC-provided FX-like traffic in the same manner as it applies to AT&T Texas's FX traffic.¹⁵³ AT&T Texas concluded that the Commission's resolution of how to treat FX traffic forms no basis for a wholesale abandonment of switched access charges for VoIP or otherwise "enhanced" traffic.

¹⁵⁰ AT&T Texas Ex. 20, Rebuttal Testimony of Mark Neinast (Neinast Rebuttal), at 5:4-10.

¹⁵¹ AT&T Texas Reply Br. at 13.

¹⁵² *Id.*

¹⁵³ *Id.* at 14.

Jointly Provided Access

UTEX's Position

According to UTEX, the legacy exchange access regime never applied to ESP traffic and, under the *Core Mandamus Order*, cannot apply to VoIP. UTEX further states that even if the traffic was not “carved out” by FTA § 251(g), the traffic would be subject to MECAB “Multiple Bill Single Tariff” billing, with each LEC directly sending its respective access bills to the third party access customer and not to the other LEC.¹⁵⁴

UTEX asserts that in order to agree with and implement AT&T Texas's theory of intercarrier compensation, Transcom, Skype, Google, and even AT&T Texas's unregulated “ESP” affiliates would have to be determined not to be really ESPs but to be instead IXC's, or “IXC-like” and that the Internet and every provider of voice-enabled Internet communications is “really” just an IXC.¹⁵⁵

AT&T Texas's Position

AT&T Texas argues that the Commission should not allow UTEX to avoid its responsibility for access charges by mischaracterizing its delivery of interexchange traffic to AT&T Texas for termination to AT&T Texas's end users as “jointly provided access” and improperly defining that term to enable UTEX to unilaterally eliminate switched access charges altogether.¹⁵⁶ AT&T Texas states that what UTEX is describing is not a true meet point billing arrangement where two LECs are jointly providing an access service to an interexchange carrier but rather it is AT&T Texas – not UTEX – that is providing access service when AT&T Texas terminates long-distance traffic to its end user customers.¹⁵⁷

According to AT&T Texas, UTEX's proposed definition for “Jointly Provided Access” inappropriately limits its application only to “Legacy” IXC's and would, thereby, exclude telecommunications carriers that might not qualify as Legacy IXC's but that nevertheless function

¹⁵⁴ UTEX Initial Br. at 23.

¹⁵⁵ UTEX Reply Br. at 24-25.

¹⁵⁶ AT&T Texas Initial Br. at 24-25.

¹⁵⁷ AT&T Texas Reply Br. at 15.

as IXCs.¹⁵⁸ Further, AT&T Texas states that the definition provides that IGI-POP traffic could not be considered jointly provided access.¹⁵⁹ AT&T Texas states that in Docket No. 33323, UTEX claimed that all of its traffic was IGI-POP traffic and thus, under this exclusion, UTEX would likely claim that its proposed definition exempts all of its traffic from access charges.

AT&T Texas claims that the FCC rejected a CLEC's similar meet-point-billing argument when it conducted an FTA §§ 251/252 arbitration after the Virginia commission declined to participate in the FTA proceedings.¹⁶⁰ In that case, according to AT&T Texas, the requesting CLEC/IXC, AT&T Corp. – much like UTEX here, had no end user customers but was, instead, seeking to provide services to IXCs. The CLEC/IXC, AT&T Corp., sought a meet point billing arrangement that would treat ILEC Verizon and AT&T Corp. as “co-carriers” in the routing of interexchange access traffic. AT&T Texas states that the FCC rejected the CLEC/IXC's language because the proposed arrangement was “inconsistent with Commission precedent establishing that, as a practical matter, a requesting carrier may not purchase UNE switching solely to provide exchange access service, without also providing local exchange service to that end user.” AT&T Texas states that the same result should obtain here. AT&T Texas states that when UTEX delivers interexchange traffic to AT&T Texas for termination to AT&T Texas's end user, UTEX is functioning as an IXC and for the reasons enumerated in Docket No. 33323, the Commission should reject UTEX's argument that the interexchange traffic was not really interexchange, because it was handed off to UTEX in the same LATA where it was delivered to AT&T Texas.¹⁶¹

Arbitrators' Decision

ESP Traffic Is Not Subject to Access Charges

Existing law provides a limited exemption from access charges for certain communications involving an ESP. Applying this exemption to the ICA at issue here, the Arbitrators conclude that AT&T Texas may not assess access charges upon UTEX when (1) UTEX provides service to a customer that meets the FCC's definition of an ESP, (2) the ESP customer elects to be

¹⁵⁸ AT&T Texas Initial Br. at 25.

¹⁵⁹ *Id.*

¹⁶⁰ AT&T Texas Reply Br. at 15.

¹⁶¹ AT&T Texas Reply Br. at 16.

treated as an ESP, (3) the ESP has a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located, and (4) the traffic is routed through that POP.¹⁶² The parties shall instead compensate one another for a communication meeting these requirements pursuant to the compensation provisions for Local Traffic.¹⁶³

FCC rules govern the assessment of interstate access charges.¹⁶⁴ FCC Rule 69.5(b) states that “[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.”¹⁶⁵ Pursuant to this provision, an IXC that uses the local exchange switching facilities of a LEC for the provision of interstate telecommunications service must pay the LEC access charges for use of those local facilities.

Shortly after establishing the access charge regime, the FCC created a limited access charge exemption for ESPs.¹⁶⁶ In explaining the basis for this exemption, the FCC stated:

Other users who employ exchange service for jurisdictionally interstate communications, including . . . enhanced service providers, . . . who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. One of our paramount concerns in fashioning a transition plan is the customer impact or market displacement that any proposed remedy might cause. Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.¹⁶⁷

¹⁶² This Arbitration Award typically refers to ESPs as customers of UTEX rather than as customers of AT&T Texas because AT&T Texas has not expressed an interest in providing service to ESP customers. The intercarrier compensation provisions of this ICA do apply reciprocally, however.

¹⁶³ The Arbitrators discuss those compensation provisions in response to DPL Issue AT&T NIM 6-4.

¹⁶⁴ See generally 47 C.F.R. §§ 69.1-69.731.

¹⁶⁵ 47 C.F.R. § 69.5(b). While the FCC's rules use the term “carrier's carrier charges,” the industry typically uses the term “access charges.”

¹⁶⁶ *In the Matter of MTS and WATS Market Structure*, CC 78-72, Memorandum Opinion and Order ¶ 83, 1983 WL 183026 (rel. Aug. 22, 1983). The ESP exemption is optional and an ESP may elect to pay access charges instead of purchasing a local business line if it so chooses. *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order ¶ 27, 16 FCC Rcd. 9151 (rel. Apr. 27, 2001) (“[T]he ESP exemption . . . affords one class of entities using interstate access – information service providers – the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXCs.”) (emphasis in original).

¹⁶⁷ *In the Matter of MTS and WATS Market Structure*, CC 78-72, Memorandum Opinion and Order ¶ 83, 1983 WL 183026 (rel. Aug. 22, 1983).

To implement the ESP exemption, the FCC: (1) excluded ESPs from regulation as carriers under Title II of the FTA, (2) defined ESPs and all other non-carriers as “end users” for purposes of its access charge rules, and (3) exempted end users from paying access charges.¹⁶⁸ FCC Rule 64.702(a) states:

[T]he term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. *Enhanced services are not regulated under title II of the Act.*¹⁶⁹

For purposes of assessing access charges, FCC Rule 69.2(m) defines the term “end user” as “any customer of an interstate or foreign telecommunications service that is not a carrier.”¹⁷⁰ Finally, FCC Rule 69.5(a) states that “[e]nd user charges shall be computed and assessed upon public end users.”¹⁷¹ Under the FCC’s rules, therefore, a LEC may not assess access charges upon an ESP even if the ESP transports a communication outside the local calling area.¹⁷²

¹⁶⁸ See *In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC 87-215, Order ¶ 20 at n. 53, 3 FCC Record 2631 (rel. Apr. 27, 1988) (“At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users.”); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC 99-69, Declaratory Ruling ¶ 9, 14 FCC Record 3689 (rel. Feb. 26, 1999) (“As explained above, under the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their PSTN links through local business tariffs.”).

¹⁶⁹ 47 C.F.R. 64.702(a) (emphasis added). The telecommunications industry uses three similar terms to refer to three different but related types of providers. As noted, the FCC’s rules use the term “enhanced service provider” (ESP). The FTA uses the term “information service provider” (ISP), which has a meaning similar to the FCC’s term ESP. The FCC also sometimes uses the acronym ISP in its orders to mean “Internet service provider.” Internet service providers qualify as both enhanced service providers and information service providers. In this Award, the acronym ISP means Internet service provider.

¹⁷⁰ 47 C.F.R. § 69.2(m).

¹⁷¹ 47 C.F.R. §§ 69.5(a).

¹⁷² *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order ¶ 20, 2 FCC Record 5986 (rel. Oct. 5, 1987), *vacated as moot* by Memorandum Opinion and Order, 7 FCC Rcd. 5644 (rel. Sept. 4, 1992) (“[U]nder this Commission’s rules, enhanced service providers are classified as ‘end users.’ An end user that interconnected local exchange lines with interstate transmission facilities through a PBX or similar device on its premises would not be required to pay interstate access charges for the interstate traffic that traversed these local exchange lines. Rather, this would be treated as part of the ‘leaky PBX’ phenomenon, and the end user would pay subscriber line charges for its local exchange lines and special access surcharges on its private line connection.”).

Requirements for ESP Traffic

As explained above, the ESP exemption permits an ESP to purchase a local business line from the LEC that provides it local service instead of paying access charges to that LEC as an IXC would. The application of this exemption to the rates charged by UTEX to its ESP customers is not an issue in this case. Instead, the dispute between the parties is whether AT&T Texas may assess access charges upon UTEX for communications involving UTEX's ESP customers. The Arbitrators conclude that under existing law AT&T Texas may not assess access charges upon UTEX when (1) UTEX provides service to a customer that meets the FCC's definition of an ESP, (2) the ESP customer elects to be treated as an ESP, (3) the ESP has a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located, and (4) the traffic is routed through that POP. The Arbitrators use the term "ESP Traffic" to refer to communications that meet these four requirements.

Definition of ESP

In order for a communication to qualify as ESP Traffic, UTEX's customer must qualify as an ESP under the FCC's definition. As noted above, FCC Rule 64.702(a) defines "enhanced service" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." UTEX argues that access charges should not apply to communications of any UTEX ESP customer that purchases IGI-POP service from UTEX's tariff.¹⁷³ UTEX describes IGI-POP service as "an information access service, designed to support the provision of Enhanced and/or Information services."¹⁷⁴ UTEX's tariff allows a customer to purchase IGI-POP service if the customer represents that it is an ESP entitled to the access charge exemption:

Consistent with the FCC's Light Regulatory Touch policy, the only current restriction is that in order to be eligible for this service from Feature Group IP, Customer must affirmatively represent that it is an Enhanced Service Provider and entitled to the ESP Exemption and will use IGI-POP service only for

¹⁷³ UTEX Initial Br. at 53.

¹⁷⁴ UTEX Ex. 4A, Feldman Rebuttal Exhibits, at 24 (UTEX Tariff § 1.1).

applications or services that qualify for the ESP Exemption. Legacy Carriers may not subscribe to the service.¹⁷⁵

UTEX has not established that an entity qualifies for the ESP exemption merely by representing that it is eligible for the exemption. The Arbitrators find that FCC rules require that the traffic in question actually meet the requirements of the FCC's definition of enhanced service. Therefore, the Arbitrators conclude that the ICA's ESP Traffic provisions should apply only to those entities that actually meet the FCC's ESP definition. As discussed in more detail below in the Establishment of Separate Trunk Group and Allocation of Burden of Proof section, the parties shall designate a separate trunk for the exchange of ESP Traffic and shall develop procedures to verify that traffic passed over that trunk in fact qualifies as ESP Traffic.

Election of ESP Exemption

In order for a communication to qualify as ESP Traffic, UTEX's ESP customer must elect to be treated as an ESP customer. UTEX's tariff allows an ESP customer to purchase either IGI-POP service or access service.¹⁷⁶ If the customer purchases IGI-POP service, its communications may qualify as ESP Traffic, as defined in this Award. But if the customer instead purchases access service from UTEX's tariff, its communications shall be subject to the ICA's provisions for interexchange traffic.¹⁷⁷

ESP Point of Presence

Finally, in order for a communication to qualify as ESP Traffic, UTEX's ESP customer must have a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located and the communication must be routed through that POP. When UTEX's ESP customer and the AT&T Texas calling or called end user are in the same local calling area, UTEX is not providing interexchange transport and is, therefore, not an IXC.¹⁷⁸ UTEX's ESP customer would also not be considered an IXC in such circumstances as a result of

¹⁷⁵ *Id.* at 71 (UTEX Tariff § 7.1.2(A)).

¹⁷⁶ *Id.* at 24 (UTEX Tariff § 1.2) (“[E]nhanced and or information service providers may subscribe to IGI-POP Service, or if they prefer, Access service.”). *See also In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order ¶ 27, 16 FCC Rcd. 9151 (rel. Apr. 27, 2001) (“[T]he ESP exemption . . . affords one class of entities using interstate access – information service providers – the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXCs.”) (emphasis in original).

¹⁷⁷ *See* Joint Ex. 3, Competing ICA Language, at 541-543 (Attachment 6 to NIM §§ 5.2, 6.0-6.6).

¹⁷⁸ *See* 47 C.F.R. § 69.5(b).

the ESP exemption.¹⁷⁹ But if the POP of UTEX's ESP customer is located outside of the local calling area, the ESP exemption does not preclude the imposition of access charges upon an IXC that transports a communication between the ESP and a LEC for delivery to or from the local calling area of the AT&T Texas calling or called end user. In the *Northwestern Bell* order, the FCC stated: "[E]nhanced service providers are treated as end users for purposes of our access charge rules. End users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers."¹⁸⁰ Other state commissions have reached this same conclusion.¹⁸¹ In addition, nothing in the FCC's rules exempts an IXC that serves an ESP from access charges. As explained above, the FCC implemented the ESP exemption by defining ESPs as end users rather than as carriers and then applying access charges only to carriers. The FCC's rules do not contain a similar exemption for IXCs that serve ESPs. UTEX may be an IXC, and therefore subject to access charges, if its ESP customer's POP is located outside the local calling area of the AT&T Texas calling or called end user. The Arbitrators discuss such situations in the Intercarrier Compensation for Interexchange Traffic That Does Not Qualify as ESP Traffic section of the Award.¹⁸²

In Docket No. 33323, the Commission determined that the ESP traffic provision in the current ICA between UTEX and AT&T Texas provides for no access compensation only for "ESP traffic that otherwise meets the definition of local traffic."¹⁸³ The Commission further

¹⁷⁹ *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order ¶ 27, 16 FCC Rcd. 9151 (rel. Apr. 27, 2001); *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order ¶ 20, 2 FCC Record 5986 (rel. Oct. 5, 1987).

¹⁸⁰ *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, CC 86-1, Memorandum Opinion and Order ¶ 21, 2 FCC Record 5986 (rel. Oct. 5, 1987), *vacated as moot* by 7 FCC Rcd. 5644 (rel. Sept. 4, 1992).

¹⁸¹ *See, e.g., Illinois Bell Telephone Co. v. Global NAPS Illinois, Inc.*, Docket No. 08-0105, Order at 44 (Illinois Commerce Comm'n 2009) ("Global is a carrier, not an ESP, and hence the ESP exemption does not apply to Global, even if the customers of Global's affiliates . . . were in fact ESPs."); *In re CLEC Coalition*, Docket No. 05-BTKT-365-ARB et al., Order No. 16 ¶ 30, 2005 WL 2331520 (Kansas Corp. Comm'n 2005) ("[The ESP] exemption applies to the information service provider, not to carriers . . . that provide service to ESPs.").

¹⁸² With respect to traffic that originates and terminates to end users in the same local calling area, as the term "end user" is defined in the End User Definition section of the Award, the Arbitrators note that such traffic qualifies as Local Traffic under the ICA language approved in connection with DPL issue AT&T NIM 6-1 even if such traffic is routed through the POP of a UTEX ESP customer located outside the local calling area of the AT&T Texas calling or called end user. The Arbitrators find that the FCC's rules and this Commission rules for interexchange traffic do not apply because this traffic is not interexchange traffic.

¹⁸³ Docket No. 33323, Arbitration Award at 67.

stated that the provision recognizes, “as explained in *Time Warner*, that ESP traffic can be local with respect to telecommunications service, despite having an interstate information service component.”¹⁸⁴ In other words, service to an ESP customer whose POP is located in the local calling area of the calling or called end user is treated as local service even if the ESP transports the communication into or outside the local calling area. The Commission declined, however, to interpret that ICA as providing for no access compensation for non-local ESP traffic.¹⁸⁵ The Arbitrators’ decision here, which requires an ESP customer’s POP to be located in the local calling area in which the calling or called end user served by AT&T Texas is located in order to qualify for the ESP Traffic provisions of the ICA, is consistent with the Commission’s decision in Docket No. 33323.

For an ESP customer to be considered within the same local calling area as the calling or called end user, the Arbitrators require the ESP to have a POP in the local calling area in which the calling or called end user served by AT&T Texas is located. The FCC has described a POP for an IXC as “the physical point where an IXC connects its network with the LEC network.”¹⁸⁶ The Arbitrators conclude that this test should also be used to determine the location of an ESP. That is, an ESP (or other entity) has a POP at the point that its network physically connects with a LEC’s network (*e.g.*, UTEX’s network).¹⁸⁷ Finally, as discussed in more detail below in the Establishment of Separate Trunk Group and Allocation of Burden of Proof section of the Award, the Arbitrators have directed the parties to draft audit procedures that allow a party to verify whether traffic passed between the parties qualifies as ESP Traffic under the terms of this Award. Those audit procedures should include provisions allowing a party to verify the location of an ESP customer’s POP.

¹⁸⁴ *Id.* The *Time Warner* decision referenced here is the Commission’s decision in *Complaint and Request for Expedited Ruling of Time Warner Communications*, Docket No. 18082, Order at 4 (Mar. 2, 1998), not the FCC’s *Time Warner Order*, which has been discussed previously in this Award.

¹⁸⁵ *Id.*

¹⁸⁶ *In the Matter of Petition of ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc. for Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission’s Rules*, DA 10-1007, Order ¶ 3 n. 6, 2010 WL 2234062 (rel. June 2, 2010).

¹⁸⁷ The location of an ESP’s POP is discussed in more detail below in the Application of Access Charge Rules section.

Relevant Geographic Area

UTEX argues that the relevant geographic area should be a LATA rather than a local calling area. More specifically, UTEX asserts that service within a LATA qualifies as telephone exchange service and is, therefore, not subject to access charges.¹⁸⁸ The FTA defines “telephone exchange service” as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.¹⁸⁹

The FCC delegated to state commissions the determination of whether service in a specific geographic area qualifies as telephone exchange service under these two alternatives.¹⁹⁰ UTEX states that its IGI-POP service qualifies as telephone exchange service under each of these alternatives¹⁹¹ because “[e]ach customer meets us in the LATA.”¹⁹² First, under alternative (A) of the definition of telephone exchange service, UTEX asserts that the term “exchange” refers to a LATA rather than a local calling area.¹⁹³ But in the First Mega-Arbitration Award, this Commission determined that the term “exchange” refers to a local calling area: “The reciprocal compensation arrangements adopted herein apply to calls that originate and terminate within the

¹⁸⁸ UTEX Ex. 1, Feldman Direct, at 247:16-17; UTEX Reply Br. at 6.

¹⁸⁹ 47 U.S.C. § 153(47).

¹⁹⁰ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order ¶ 1035, 11 FCC Record 15499 (rel. Aug. 8, 1996) (“[S]tate commissions have the authority to determine what geographic areas should be considered ‘local areas’ for the purpose of applying reciprocal compensation obligations under section 251(b)(5).”). While the FCC subsequently determined that section 251(b)(5) is not limited to local traffic, *see In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order ¶ 34 (rel. Apr. 27, 2001), the Arbitrators are not aware of any FCC decision withdrawing the authority of state commissions to determine whether service in a specific area is telephone exchange service and, therefore, subject to the reciprocal compensation obligations of section 251(b)(5).

¹⁹¹ UTEX Ex. 1, Feldman Direct, at 244:21-251:11.

¹⁹² UTEX Ex. 1, Feldman Direct, at 253:17-19; *see also* UTEX Ex. 1 at 253:11 and 254:2-3; UTEX Reply Br. at 43.

¹⁹³ UTEX Ex. 1, Feldman Direct, at 244:21-247:17.

mandatory single or multiexchange *local calling area* of SWBT including the mandatory EAS areas served by SWBT.”¹⁹⁴ The Commission affirmed this holding in Docket No. 28821:

Consistent with the Commission’s holding in Docket No. 21982, the Commission finds that reciprocal compensation arrangements apply to calls that originate from and terminate to an end-user within a mandatory single or multi-exchange *local calling area*, including the mandatory EAS/ELCS areas comprised of SBC exchanges and the mandatory EAS/ELCS areas comprised of SBC exchanges and exchanges of independent ILECs.¹⁹⁵

In addition, the Commission expressly declined in that docket to adopt the LATA as the relevant geographic area for telephone exchange service: “The Commission also declines to adopt AT&T’s LATA-wide compensation plan because it has implications for ILEC revenue streams, such as switched access, and affects rates for other types of calls, such as intraLATA toll calls, that are beyond the scope of this proceeding.”¹⁹⁶

The Commission has already concluded, therefore, that the term “exchange” should refer to a local calling area rather than, as UTEX argues, a LATA. Furthermore, UTEX admits that the FTA does not specifically define the term “exchange” and that a local calling area is one possible definition.¹⁹⁷ Because UTEX has not raised any policy reasons that would justify the Commission’s departure from its longstanding precedent on this issue, the Arbitrators decline to adopt UTEX’s proposed definition of the term “exchange.”

In the alternative, UTEX argues that its IGI-POP service is “comparable” to the service described in alternative (A) and, therefore, qualifies as telephone exchange service under alternative (B).¹⁹⁸ UTEX states that the Commission has found optional EAS and FX service to be comparable service.¹⁹⁹ But UTEX fails to explain why its service should be treated similarly. In support of its position that IGI-POP service is comparable service, UTEX witness Mr. Feldman simply stated, “UTEX’s services – while different in some ways – is also quite

¹⁹⁴ *Petition of MFS Communications Co., Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Co., Inc. and Southwestern Bell Telephone Co.*, Docket No. 16189, Arbitration Award ¶ 58 (Nov. 8, 1996) (emphasis added).

¹⁹⁵ Docket No. 28821, Arbitration Award—Track 1 Issues, INTERCARRIER COMPENSATION-JT DPL-FINAL at 1 (Feb. 23, 2005) (emphasis added).

¹⁹⁶ Docket No. 28821, Arbitration Award—Track 1 Issues, INTERCARRIER COMPENSATION-JT DPL-FINAL at 1. The Arbitrators note that “AT&T” refers to the CLEC that participated in the Docket No. 28821.

¹⁹⁷ UTEX Ex. 1, Feldman Direct, at 244:22-23.

¹⁹⁸ *Id.* at 249:3-5.

comparable in others. I believe it fits quite neatly into what Part B of the definition is trying to cover.”²⁰⁰ This conclusory testimony is not sufficient to establish that UTEX’s service is comparable to service provided within a local calling area. Nor has UTEX described its proposed service with sufficient specificity to allow the Arbitrators to make such a determination.

Finally, the Arbitrators conclude that a communication does not qualify as ESP Traffic if UTEX routes the communication to or from its ESP customer using optional EAS or FX service.²⁰¹ The FCC has not extended the ESP exemption to ESPs that subscribe to optional EAS or FX service. Furthermore, the FCC’s orders discussing the ESP exemption do not indicate that payment of access charges in lieu of optional EAS or FX compensation rates by ESPs “could affect their viability,” which was the basis for the creation of the exemption.²⁰² And the record in this case does not support such a conclusion.

The Arbitrators note, however, that if the traffic does not qualify as ESP Traffic, then Optional EAS traffic and FX traffic exchanged between the parties, where an end user of either party has subscribed to one of those services, will be subject to the compensation provisions for Optional EAS traffic and FX traffic, respectively, even if such traffic is routed through UTEX’s ESP customer. The compensation for Optional EAS traffic is set forth in ICA language approved under DPL issue AT&T NIM 6-12, and the compensation for FX traffic is set forth in ICA language approved under DPL issue AT&T NIM 6-3.

¹⁹⁹ *Id.* at 249:1-3.

²⁰⁰ *Id.* at 249:3-5.

²⁰¹ FX service is a retail service offering that allows FX customers to obtain exchange service from a mandatory local calling area other than the mandatory local calling area where the FX customer is physically located. FX service enables particular end users customers to avoid what might otherwise be toll calls between the FX customer’s physical location and customers in the foreign exchange. Docket No. 24015, Revised Arbitration Award at 31-32 (Aug. 28, 2002). UTEX does not assert that it provides FX service. UTEX Ex. 1, Feldman Direct, at 248:15 (“Although we do not contend we provide ‘FX’ service . . .”).

Optional EAS service is a service that enlarges a customer’s local calling scope and permits subscribers between exchanges that are *contiguous* or that are contained within a *continuous* boundary, to call each other for an additional monthly charge. Section 8.1 in Attachment 12: Compensation in SBC Texas/CLEC Joint Petitioners ICA approved in Docket No. 28821.

²⁰² See *In the Matter of MTS and WATS Market Structure*, CC 78-72, Memorandum Opinion and Order ¶ 83.

Establishment of Separate Trunk Group and Allocation of Burden of Proof

The Arbitrators acknowledge that a party to this ICA may have difficulty determining whether traffic delivered to it by the other party qualifies as ESP Traffic, because the party delivering the traffic possesses information about its customers not available to the party receiving the traffic. The Arbitrators also note that the Commission determined in Docket No. 33323 that UTEX delivered misrouted traffic to AT&T Texas.²⁰³ For these reasons, the Arbitrators direct the parties to draft ICA language requiring the establishment of an appropriate number of separate trunk groups exclusively for the transport of ESP Traffic. The parties shall also draft audit procedures that allow a party to verify that traffic passed on those trunk groups actually qualifies as ESP Traffic. The procedures shall, at a minimum, allow a party to verify whether a purported ESP customer meets the FCC's ESP definition and allow a party to verify the location of an ESP customer's POP. In Order No. 30, the Arbitrators struck language proposed by UTEX that addressed the misrouting of traffic.²⁰⁴ The Arbitrators do not consider that language to be sufficient for verification purposes because, for example, it does not provide the receiving party with sufficient data to determine the proper routing and rating of a call and unreasonably requires a receiving party to dispute a call's routing within 60 days of the call. Finally, the Arbitrators conclude that the ICA shall contain language providing that, in a post-interconnection dispute involving the characterization of traffic as ESP Traffic, a party asserting that it has delivered ESP Traffic to the other party bears the burden of proving that such traffic in fact qualifies for the ESP Traffic provisions of the ICA.

The parties shall draft language implementing these decisions. If the parties cannot agree on language implementing these decisions, each party shall include its proposed language and the reasons supporting its adoption in the party's exceptions to the PFA.

CPN Requirements

The Arbitrators conclude that the parties must provide CPN for ESP Traffic consistent with the requirements established in connection with DPL issue AT&T NIM 6-5. While CPN is not necessary to determine the rating for ESP Traffic, which is subject to the Local Traffic

²⁰³ Docket No. 33323, Arbitration Award at 48 ("The Arbitrator concludes that IXCs have routed toll traffic through UTEX's interconnection facilities to avoid switched access charges. . . . UTEX acknowledged that a UTEX customer improperly routed VarTec's traffic through UTEX's network.").

²⁰⁴ That language is included in UTEX Ex. 2, Feldman Direct Exhibits, at 18-19.

compensation rules, CPN is necessary for the appropriate rating and billing of any non-ESP Traffic that is misrouted onto the ESP Traffic trunk. The issue of the appropriateness of requiring parties to deliver CPN information for traffic exchanged between the parties and what constitutes a valid CPN is addressed in greater detail under DPL issue AT&T NIM 6-5.

ICA Language

For the reasons explained above, the following language should be included in the ICA:

Attachment 6 to NIM: Intercarrier Compensation

- ESP Traffic exchanged between the Parties shall be compensated pursuant to the election made by the CLEC pursuant to Section 1.5 of this Attachment.²⁰⁵

GTC Definitions

- “Enhanced Service Provider” or “ESP” is a provider of enhanced services as those services are defined in 47 C.F.R. Section 64.702.
- “ESP Traffic” is telecommunications traffic for which (1) one party to this Agreement provides service to an ESP, (2) the ESP elects to be treated as an ESP rather than as an IXC, (3) the ESP has a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located, and (4) the traffic is routed through that POP.
- “Point of Presence” or “POP” is a physical point where an entity connects its network with the network of either Party.

Intercarrier Compensation for Interexchange Traffic That Does Not Qualify as ESP Traffic

The Arbitrators concluded above that UTEX does not provide telephone exchange service when it serves an ESP customer whose POP is located outside the local calling area of the calling or called end user served by AT&T Texas.²⁰⁶ UTEX asserts that the service it provides should

²⁰⁵ Like the compensation provisions in the Docket No. 28821 CLEC Coalition ICA, Section 1.5 of Attachment 6 to NIM gives UTEX three compensation options for Local Traffic and ISP-Bound Traffic. *See* the Arbitrators’ decision for DPL issue AT&T NIM 6-4.

²⁰⁶ While the Arbitrators also concluded above that a communication does not qualify as ESP Traffic if UTEX routes the communication to or from its ESP customer using optional EAS or FX service, the Arbitrators noted that if the traffic does not qualify as ESP Traffic, then Optional EAS traffic and FX traffic exchanged between the parties, where an end user of either party has subscribed to one of those services, will be subject to the compensation provisions for Optional EAS traffic and FX traffic, respectively, even if such traffic is routed through UTEX’s ESP customer.

In addition, while this section addresses compensation involving UTEX’s ESP customers, the interexchange provisions of the ICA also apply when UTEX serves a traditional IXC customer.

be characterized as exchange access if it is not characterized as telephone exchange service.²⁰⁷ UTEX expressly denies that it is an IXC or provides interexchange service.²⁰⁸ Consequently, UTEX claims that AT&T Texas may not bill UTEX for access charges but must instead bill UTEX's ESP customer pursuant to the MECAB guidelines for jointly provided access.²⁰⁹ AT&T Texas, on the other hand, states that "[w]hen UTEX delivers interexchange voice telephone calls for termination to AT&T Texas, UTEX is acting as an interexchange carrier providing interstate telecommunications. Under 47 C.F.R. § 69.5(b), UTEX is subject to access charges, as a matter of law."²¹⁰

The FCC has recognized on a number of occasions that existing law does not expressly address the intercarrier compensation that applies in cases such as this one.²¹¹ Nevertheless, in denying UTEX's first petition for preemption, the FCC stated that this Commission should arbitrate the ICA between UTEX and AT&T Texas "relying on existing law."²¹² In this section, the Arbitrators provide guidance to the parties regarding the application of existing law to interexchange communications that do not qualify as ESP Traffic, Optional EAS traffic, or FX traffic.

Interstate and Intrastate Access Charge Rules

The FCC sets the rules for assessment of access charges on *interstate* communications. FCC Rule 69.5(b) states that access charges apply to "all interexchange carriers that use local

²⁰⁷ UTEX Ex. 1, Feldman Direct, at 249:18.

²⁰⁸ UTEX Initial Br. at 9-10.

²⁰⁹ UTEX Ex. 1, Feldman Direct, at 250:4-251:10; UTEX Initial Br. at 58.

²¹⁰ AT&T Texas Reply Br. at 10.

²¹¹ See, e.g., *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VOIP Providers*, WC 06-55, DA 07-709, Memorandum Opinion and Order ¶ 17, 22 F.C.C. Record 3513 (rel. Mar. 1, 2007) ("Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VOIP services. We do not find it appropriate or necessary to resolve the complex issues surrounding the interpretation of Title II more generally").

²¹² *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC 09-134, Memorandum Opinion and Order ¶ 10, 24 FCC Rcd. 12573 (rel. Oct. 9, 2009).

switching facilities for the provision of interstate and foreign telecommunications services.”²¹³ The FCC’s access charge rules define “interexchange” as “services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as ‘access service’ for purposes of this part.”²¹⁴ These rules define “access service” as “services and facilities provided for the origination or termination of any interstate or foreign telecommunications.”²¹⁵ Taken together, these rules impose access charges on carriers that offer services other than origination and termination services that are an integral part of interstate or foreign telecommunications.

This Commission sets the rules for assessment of access charges on *intrastate* communications. P.U.C. SUBST. R. 26.5(107) defines an IXC as “[a] carrier providing any means of transporting intrastate telecommunications messages between local exchanges, but not solely within local exchanges, in the State of Texas.” The Commission has clarified that service between exchanges in a mandatory EAS area or extended local calling service (ELCS) area does not qualify as interexchange service subject to access charges.²¹⁶

As explained in connection with DPL issue AT&T NIM 6-5, the Arbitrators have directed the parties to use CPN to determine the originating and terminating points of a communication for intercarrier compensation purposes. Therefore, the FCC’s rules for imposition of interstate access charges apply to communications where the calling and called party numbers are assigned to exchanges in different states. And this Commission’s rules for imposition of intrastate access charges apply to communications where the calling and called party numbers are assigned to exchanges in different local calling areas within Texas.

Application of Access Charge Rules

The mere fact that UTEX does not want to be an IXC or that the IGI-POP provisions of UTEX’s tariff do not purport to offer interexchange service is not controlling for purposes of assessing access charges. If UTEX meets the definition of an IXC for a given communication,

²¹³ 47 C.F.R. § 69.5(b). *See In the Matter of Access Charge Reform*, CC 96-262, First Report and Order ¶ 22, 12 FCC Rcd. 15982 (rel. May 16, 1997) (“Part 69 specifies in detail the rate structure for recovering those costs. That is, the rules tell the incumbent LECs the precise manner in which they may assess charges on interexchange carriers and end users.”).

²¹⁴ 47 C.F.R. § 69.2(s).

²¹⁵ 47 C.F.R. § 69.2(b).

then AT&T Texas may assess access charges upon UTEX for that communication consistent with the interexchange provisions of the ICA. The FCC explicitly recognized in the *IP-in-the-Middle Order* that a CLEC may assume the role of an IXC: “Depending on the nature of the traffic, carriers such as . . . competitive LECs may qualify as interexchange carriers” for purposes of the FCC’s access charge rules.²¹⁷ The Kansas commission reached the same conclusion when it found that “if the ESP contracts with a third party to transport the VoIP calls, like Global Crossing, that third party’s interexchange transport of the VoIP calls is subject to access charges assessed by an ILCEC [sic], like AT&T.”²¹⁸ Consequently, if UTEX is an IXC for a given communication, AT&T Texas may assess access charges upon UTEX even though UTEX holds itself out as providing only local exchange services.

UTEX has consistently been vague about how traffic reaches its network. In his direct testimony, UTEX witness Mr. Feldman testified that UTEX’s customers “meet us in the LATA” in which the calling or called AT&T Texas end user is located and that UTEX has a “logical connection” to its customer’s equipment.²¹⁹ Mr. Feldman further testified that “[w]hen we get a call it comes through the situs; it is in effect the ‘demarcation point’ between the customer’s system and UTEX’s system.”²²⁰ These statements do not describe the POP location of UTEX’s ESP customer, which is necessary to determine whether UTEX is an IXC.

UTEX has also stated that the public Internet or a private IP network may be used to transport communications between UTEX and its ESP customers. In Mr. Feldman’s rebuttal testimony in Docket No. 33323, excerpts of which were admitted in this docket, Mr. Feldman stated that “the media may or may not move through the public or private Internet depending on

²¹⁶ See Docket No. 28821, Arbitration Award—Track 1 Issues, INTERCARRIER COMPENSATION-JT DPL-FINAL at 1.

²¹⁷ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access charges*, WC 02-361, Order ¶ 19 n.80, 19 FCC Rcd. 7457 (rel. Apr. 21, 2004).

²¹⁸ *In the Matter of the Petition of Southwestern Bell Telephone Company d/b/a AT&T Kansas for Compulsory Arbitration of Unresolved Issues with Global Crossing Local Service, Inc. and Global Crossing Telemanagement, Inc. for an Interconnection Agreement Pursuant to Sections 251 and 252 of the Federal Telecommunications Act of 1996*, Docket No. 10-SWBT-419-ARB, Arbitrator’s Determination of Unresolved Interconnection Agreement Issues Between AT&T and Global Crossing ¶ 30 (Kansas Corp. Comm’n Apr. 23, 2010).

²¹⁹ UTEX Ex. 1, Feldman Direct, at 253:17-18 & 253:8-9.

²²⁰ *Id.* at 253:17-19.

what the media is.”²²¹ Furthermore, during the hearing on the merits in this docket, counsel for UTEX asked a number of questions about the compensation applicable to communications depicted in a set of call flow diagrams.²²² In response to a question from the Arbitrators regarding one of those diagrams, counsel for UTEX stated that “much of what’s in between H and probably somewhere in between D and E would just be over the Internet.”²²³

While UTEX has not been clear about how traffic reaches its network, the Arbitrators have reached several general conclusions about when UTEX would be an IXC and would, therefore, be subject to access charges. First, UTEX is an IXC when it owns, leases, or operates a network (*e.g.*, a circuit-switched or private IP-based network) used to transport communications between UTEX and an ESP customer’s POP located in an exchange other than an exchange in which the AT&T Texas calling or called end user is located. For such communications that originate or terminate²²⁴ in different states or countries, UTEX provides a service *integral to* interstate or foreign telecommunications because the communications could not be completed without the service UTEX provides.²²⁵ Furthermore, UTEX does not provide origination or termination for such communications because it transports the communications between exchanges rather than within an exchange.²²⁶ Under the FCC’s rules, therefore, UTEX would be an IXC subject to the FCC’s rules for interstate and foreign access charges.²²⁷ For such communications that originate and terminate in different local calling areas within Texas, UTEX provides a means of transporting intrastate telecommunications messages between local exchanges.²²⁸ Under the Commission’s rules, therefore, UTEX would be an IXC subject to intrastate access charges. The Arbitrators note that, while different access charge *rules* apply to interstate and intrastate

²²¹ UTEX Ex. 2, Feldman Direct Exhibits, at 107 (Feldman Rebuttal from Docket No. 33323 at 11:10-11).

²²² *See, e.g.*, Tr. at 143:24-150:13 (Apr. 13, 2010).

²²³ Tr. at 163:12-164:7 (Apr. 13, 2010) (discussing UTEX Ex. 13 at 4). The Arbitrators note that UTEX Ex. 13 does not include page numbers. For identification purposes, the call diagram at issue here refers to a called party number of 512-404-1000 and a calling party number of 500-888-1000.

²²⁴ As discussed above, the origination and termination points of a communication will be determined using CPN.

²²⁵ *See* 47 C.F.R. §§ 69.2(s), 69.5(b).

²²⁶ As explained above in the Interstate and Intrastate Access Charge Rules section, FCC rules impose access charges on carriers that offer services other than origination and termination services that are an integral part of interstate or foreign telecommunications.

²²⁷ *See* 47 C.F.R. §§ 69.2(b), 69.2(s), 69.5(b).

communications (i.e., the FCC's rules and the Commission's rules), AT&T Texas's access charge *rates* are the same for interstate and intrastate interexchange communications.²²⁹

As discussed above, UTEX has stated that it may provide service using the public Internet. The Arbitrators conclude that UTEX is an IXC when it uses the public Internet to transport communications between itself and an ESP customer whose POP is located in an exchange other than the exchange in which the AT&T Texas calling or called end user is located. In the *IP-in-the-Middle* order, the FCC concluded that access charges applied when an IXC (in that case, AT&T) used the public Internet to transport communications between PSTN users in different exchanges. In response to comments that access charges should not apply when a carrier transports communications using the public Internet rather than a private IP-based network, the FCC stated the following:

These commenters, however, fail to explain why using the Internet, as opposed to a private IP network or some other type of network, is at all relevant to our analysis of whether AT&T's specific service should be assessed interstate access charges, particularly here where AT&T *merely uses the Internet as a transmission medium without harnessing the Internet's broader capabilities*. In the *IP-Enabled Services* rulemaking proceeding it is possible that we may draw such distinctions, but we have not done so *under our current rules*.²³⁰

Thus, the FCC concluded that its existing rules do not exempt public Internet based interexchange services from access charges. The FCC further stated that “[w]e do not believe that a service of the type described above – which provides no enhanced functionality to the end user due to the conversion to IP – is the kind of use of the ‘Internet or interactive services’ that Congress sought to single out for exceptional treatment.”²³¹ Just as AT&T merely used the Internet as a transmission medium in the *IP-in-the-Middle* order, UTEX would also merely be using the Internet to transport communications between exchanges.²³² Both UTEX and its customer would have to acquire Internet access in such a circumstance, and the two effectively would collaborate to transport the communication between exchanges. The Arbitrators do not

²²⁸ P.U.C. SUBST. R. 26.5(107).

²²⁹ See *Informational Notice – Implementation of Concurrence of Interstate and Intrastate Switched-Access Tariffs*, Tariff No. 38042 (Mar. 10, 2010).

²³⁰ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access charges*, WC 02-361, Order ¶ 17, 19 FCC Rcd. 7457 (rel. Apr. 21, 2004) (emphasis added).

²³¹ *Id.*

agree with UTEX's characterization that UTEX's ESP customer transports communications from the ESP's location to UTEX's location over the Internet and that UTEX does not participate in that transport. Rather, both UTEX and its customer are involved in transporting the communication over the Internet.

In the ESP Point of Presence section above, the Arbitrators concluded that an ESP or other entity has a POP at the point that its network physically connects with a LEC's network (*e.g.*, UTEX's network). UTEX asserts that it has a "logical connection" with its ESP customers,²³³ but has not explained what that means. To the extent that UTEX means that it uses the Internet to connect to its ESP customer, the Internet does not itself establish a POP for the ESP customer in the local calling area where UTEX is located.

UTEX states that "the fact that the hand-off is 'virtual' cannot have any significance" and that "[a] ruling that hardware rather than software is required would violate § 157 of the Act, and clearly indicate a bias against more efficient new technology entering to compete against inefficient and antiquated old technology."²³⁴ The Arbitrators' decision does not prohibit UTEX and its ESP customer from using a logical connection or a virtual hand-off. Nor does the Arbitrators' decision result in a bias against those technologies because the Arbitrators have not imposed access charges upon those technologies for communications that would not be subject to access charges if transported using traditional technologies.

To illustrate how these rulings should be applied in various situations, the Arbitrators provide the following three examples. First, assume that UTEX's ESP customer has physical facilities in another state and that the public Internet is used to transport communications between those facilities and UTEX. In this example, UTEX would be an IXC because, as explained above, UTEX would be using the Internet to transport communications between exchanges.

Second, assume that UTEX's ESP customer has a POP in Local Calling Area 1 (LCA1) and the AT&T Texas calling or called end user is located in Local Calling Area 2 (LCA2). LCA1 and LCA2 are located in the same LATA. In this example, UTEX would also be an IXC because UTEX would be responsible for transporting the communication from one local calling area to

²³² *Id.*

²³³ UTEX Ex. 1, Feldman Direct, at 253:8-9 ("We do have a logical connection to our customer's equipment").

²³⁴ *Id.* at 254 n.22.

another. The Arbitrators note that the Commission's single point of interconnection rule allows a CLEC to establish one point of interconnection (POI) in each LATA as a market entry mechanism.²³⁵ That is, a CLEC does not need a separate POI with the ILEC in each local calling area within a LATA; rather, the CLEC can establish one POI with the ILEC in one local calling area and use that POI to serve customers in other local calling areas within the same LATA. Depending on the location of UTEX's POI with AT&T Texas, UTEX may not actually transport a communication from one local calling area to another. Instead, UTEX may pass the communication to AT&T Texas in one local calling area and AT&T Texas may then transport the communication to another local calling area for termination to AT&T Texas's customer. In such a case, UTEX would nevertheless be responsible for the interexchange communication and would be subject to access charges, because it provides a service *integral to* the communications by delivering the call to AT&T Texas and the communications could not be completed without the service UTEX provides.²³⁶

Finally, assume that UTEX's ESP customer has physical facilities in the local calling area in which the AT&T Texas calling or called end user is located and that the public Internet is used to transport communications between those facilities and UTEX. In connection with service provided over the Internet, the FCC has described a POP as "a physical location that houses servers, routers, switches and aggregation equipment."²³⁷ If UTEX's ESP customer has that kind of equipment in the local calling area in which the AT&T Texas calling or called end user is located, then UTEX's ESP customer has a POP in that local calling area. Consequently, the ESP Traffic provisions of the ICA would apply in this example assuming that the other requirements for ESP Traffic are met. The mere fact that the Internet is used to transport communications between UTEX's ESP customer and UTEX does not itself make the ESP Traffic provisions of the ICA inapplicable.

²³⁵ Docket No. 28821, Arbitration Award – Track 1 issues at 16 (February 22, 2005). The Commission also concluded that CLECs shall establish additional POIs when traffic exceeds 24 DS1s. *Id.*

²³⁶ As explained above in the Interstate and Intrastate Access Charge Rules section, FCC rules impose access charges on carriers that offer services other than origination and termination services that are an integral part of interstate or foreign telecommunications. As also explained above in that section, the Commission's rules impose access charges on carriers that transport intrastate telecommunications traffic between local exchanges.

²³⁷ *In the Matter of Connect America Fund*, WC 10-90, Notice of Inquiry and Notice of Proposed Rulemaking at Glossary, 25 FCC Rcd. 6657 (rel. Apr. 21, 2010).

Jointly Provided Access

The Arbitrators acknowledge that there may be situations in which UTEX is not an IXC and instead jointly provides exchange access with AT&T Texas. AT&T Texas claims that UTEX does not provide exchange access because “[i]t is AT&T Texas – not UTEX – that is providing access service when AT&T Texas terminates long-distance traffic to its end user customers.”²³⁸ While AT&T Texas seems to challenge the very idea that a CLEC can jointly provide exchange access with an ILEC, the FCC has explicitly recognized this possibility. In addressing the switched access rates that CLECs may charge to IXCs, the FCC noted that “there are situations where a competitive LEC may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods.”²³⁹ The FCC then acknowledged the intermediate role that a CLEC may assume in such circumstances: “[W]e find that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.”²⁴⁰ As a general matter, therefore, the Arbitrators conclude that there may be circumstances in which UTEX jointly provides exchange access with AT&T Texas.

Under DPL issue AT&T NIM 6-11, the Arbitrators have approved ICA language allowing AT&T Texas and UTEX each to bill an IXC using the MECAB guidelines when AT&T Texas and UTEX jointly provide exchange access. The MECAB guidelines are designed to produce accurate, verifiable, and auditable bills in multiple provider situations.²⁴¹ Those guidelines require each provider to identify the IXCs that have a direct connection to the provider’s network. Among other things, a provider must identify the carrier identification code (CIC) assigned by the North American Numbering Plan Administration (NANPA) and the access customer terminal location (ACTL) identifier for each IXC that is directly connected to the provider.²⁴²

²³⁸ AT&T Texas Reply Br. at 15.

²³⁹ *In the Matter of Access Charge Reform*, CC 96-262, Eighth Report and Order and Fifth Order on Reconsideration ¶ 16, 19 FCC Rcd. 9108 (rel. May 18, 2004).

²⁴⁰ *In the Matter of Access Charge Reform*, CC 96-262, Eighth Report and Order and Fifth Order on Reconsideration ¶ 17.

²⁴¹ UTEX Ex. 4, Feldman Rebuttal Exhibits, at 92 (MECAB Guidelines §§ 1-2.1).

²⁴² *Id.* at 123 (MECAB Guidelines § 5.3.2).

The Arbitrators conclude that in cases where an IXC connected to UTEX does not have a CIC and ACTL identified, AT&T Texas may bill UTEX directly rather than billing the IXC itself. In its *Time Warner* order, the FCC noted that Time Warner's petition described a wholesale/retail provider relationship in which the wholesale carriers assumed responsibility for compensating the ILEC for termination of traffic between those two parties.²⁴³ The FCC adopted this arrangement as an explicit condition of the interconnection rights granted to Time Warner in its order.²⁴⁴ The Arbitrators conclude that this same condition should apply here when UTEX's IXC customers do not have a CIC and ACTL identifier, as required by the MECAB guidelines. The Arbitrators provide language implementing this requirement below.

ICA Language

For the reasons explained above, Attachment 6 to NIM: Intercarrier Compensation should be modified as follows:²⁴⁵

- 5.0 ~~Reciprocal~~ Compensation for Termination of IntraLATA and InterLATA Interexchange Toll Traffic When a Party is an IXC.
- 5.2 For intrastate intraLATA interexchange ~~service~~ traffic, not considered Local Traffic, ISP-Bound Traffic, ESP Traffic, Optional EAS Traffic, FX traffic, FGA Traffic, Meet Point Billing Traffic, or Cellular Traffic, compensation for termination of this traffic will be at terminating access rates for Message Telephone Service (MTS) and originating access rates for 800 Service, including the Carrier Common Line (CCL) charge, as set forth in each Party's intrastate access service tariff. For interstate intraLATA service, compensation for termination of this traffic will be at terminating access rates for MTS and originating access rates for 800 Service including the CCL charge, as set forth in each party's interstate access service tariff.
- 5.3 For interLATA interexchange traffic, compensation for termination of this traffic will be at access rates as set forth in each Party's own applicable interstate or intrastate access tariffs.
- 6.0 Compensation for Origination and Termination of Switched Access Service Traffic to or from ~~an~~ a Third-Party Interexchange Carrier (IXC) (Meet-Point Billing (MPB) Arrangements).

²⁴³ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC 06-55, DA 07-79, Memorandum Opinion and Order ¶ 1, 22 FCC Rcd. 3513 (rel. Mar. 1, 2007).

²⁴⁴ *Id.* ¶ 17.

²⁴⁵ The Arbitrators note that they have provided additional intercarrier compensation ICA language in connection with DPL issues AT&T NIM 6-10 and 6-11.

- 6.1 For interLATA traffic and intraLATA traffic, compensation for origination or termination of intercompany Meet Point Billing traffic will be at access rates as set forth in each Party's own applicable interstate or intrastate access tariffs. When such traffic is contained in the Optional Calling Areas, compensation will be applied pursuant to Section 8.0 below.~~5.0 above~~.
- 6.7 If an IXC interconnected to a Party does not have a CIC assigned by NANPA and an ACTL identifier, the other Party may bill the interconnecting Party instead of billing the IXC.

500 Service

DPL Issue: AT&T NIM 5

AT&T: a) Should UTEX be allowed to require AT&T to continue to route its traffic in blocking situations?

UTEX: b) Can AT&T block UTEX's 500 numbers?

UTEX's Position

UTEX contends that AT&T Texas has refused to perform the switch translations for "500" calls, originated on AT&T Texas's network that are addressed to numbering resources assigned to UTEX, and that this refusal constitutes unlawful blocking of numbers under FCC Rule 51.703(b). This service is one in which the caller dials a number beginning with "500." The call is routed to an ESP, which in turn locates the called party using a list of numbers where that party might be found. UTEX further states that AT&T Texas seeks to require UTEX to purchase AT&T Texas's 500 service under its access tariff in order for AT&T Texas to allow such calls, which would result in millions of dollars in non-recurring charges and approximately \$0.04 per minute in usage charges to be paid to AT&T Texas by UTEX. UTEX demands that AT&T Texas be required to cease blocking UTEX-bound calls and be instructed that it cannot require UTEX to buy an AT&T Texas service for this purpose, particularly if pricing is access based.²⁴⁶

UTEX states that its 500 service is specifically designed to be telephone exchange service rather than telephone toll service; that if the service it is providing is classified as telephone exchange service, then it is covered by FTA §§ 251(b)(5), §251(c)(2), and §251(d); and that AT&T Texas's tariff is inconsistent with the requirements of these provisions. UTEX further

contends that AT&T Texas's position stifles innovation in the marketplace by insisting on access tariff pricing, and that the FCC has never ruled that access tariffs are appropriately applied to VoIP; rather, it has expressly proscribed the application of these tariffs to a CLEC providing telephone exchange service.²⁴⁷

UTEX cites the efficacy of its 500 service in situations such as hurricanes, in which displaced persons could be reached or have messages stored for their retrieval, and asks whether this is not the type of societal benefit the FTA envisioned.²⁴⁸

UTEX cites FCC orders that it contends make clear that 500 service is not solely related to or part of an IXC function.²⁴⁹ UTEX further states that the FCC order allowing AT&T Texas's tariff to go into effect specifically reserved the issue of whether it was applicable when an ESP is involved.²⁵⁰ UTEX states that 500 service can be supplied by LECs, ESPs, or IXCs, but that AT&T Texas's tariff only addresses 500 service supplied by IXCs.²⁵¹ UTEX states that it told the FCC and NANPA that it would be using its 500 numbers for exchange service, and that was the basis on which the resources were assigned.²⁵²

UTEX maintains that AT&T Texas is postulating a void in the FTA and discusses the fact that UTEX's IGI-POP tariff allows UTEX customers to manipulate data in an SS7 field that would otherwise contain CPNs, to the extent this does not conflict with LEC uses of CPN, thus providing calling party identification. UTEX includes the caveat that this identifying information cannot conflict with legacy LEC uses of CPNs, but states that UTEX does not to require its customers to adhere to "AT&T's monopoly imposed 'rules'" in this regard. UTEX

²⁴⁶ UTEX Ex. 1, Feldman Direct, at 270:17-271:10.

²⁴⁷ UTEX Initial Br. at 50.

²⁴⁸ *Id.* at 49.

²⁴⁹ *In the Matter of The Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., Cincinnati Bell Telephone Company, GTE Services Corporation, The NYNEX Telephone Companies, Pacific Bell, Rochester Tele-phone Corp., Southern New England Telephone Company, Southwestern Bell Telephone Company, The United Telephone and Central Telephone Companies, and U S West Communications Petitions for Waiver of Sections 69.4(b) and 69.106 of Part 69 of the Commission's Rules*, DA 94-1350, Order ¶ 3, 9 FCC Record 7873 (rel. Nov. 1994) ("500 Tariff Waiver Order").

²⁵⁰ *500 Tariff Waiver Order* ¶ 32.

²⁵¹ UTEX Initial Br. at 51.

²⁵² *Id.* at 49-52.

goes on to state, “No other CLEC both has a tariff like IGI-POP or has refused to be a voluntary partner in charging voice-embedded Internet communications on a per minute basis.”²⁵³

UTEX cites the *GNAPS Massachusetts DTE Arbitration* as directly holding that a 500 service offered by Verizon and used by ESPs was not telephone toll, but was instead telephone exchange service and local.²⁵⁴

UTEX asserts that AT&T Texas’s contention that 500 service has never been used and is an IXC service is incorrect. UTEX further states that AT&T Texas conflates the issue of blocking of 500 numbers and inadequate trunking capacity, thus sidestepping the point (relating to switch translations) being raised by UTEX. UTEX also says that AT&T Texas seeks to confuse this issue by implying that UTEX is seeking declassified UNEs, but that UTEX’s 500 service issue relates rather to interconnection and reciprocal compensation, and has nothing to do with UNEs.²⁵⁵

UTEX also states that AT&T Texas’s interpretations of the FTA, taken as a whole, prohibit UTEX from providing 500 service, thus avoiding the requirement that AT&T Texas interconnect with a competing LEC. It is also UTEX’s contention that AT&T Texas incorrectly asserts that all issues raised by UTEX were resolved in Docket No. 28821, although that case specifically excluded VoIP issues from consideration, and that AT&T Texas skirts its duties under the FTA by proposing that UTEX purchase services as a customer. Absent an order by the Commission for AT&T Texas to interconnect and route UTEX’s 500 service calls under the FTA, UTEX believes that AT&T Texas will claim that UTEX has no legal right to launch its 500 service unless it is as an access service.²⁵⁶

UTEX notes that AT&T Texas’s own proposed terms provide for the performance of switch translations without charge. It further notes that FCC Rule 51.703(b) prohibits an ILEC from imposing such a charge.²⁵⁷ UTEX recounts that, when it applied to Neustar (the numbering administrator) for 500 numbers, providing a full description of how UTEX intended to use them, the application was suspended, owing to Neustar’s having never received a request for non-

²⁵³ UTEX Reply Br. at 52.

²⁵⁴ *Id.* at 53.

²⁵⁵ UTEX Ex. 3, Rebuttal Testimony of Lowell Feldman (Feldman Rebuttal), at 13-15.

²⁵⁶ *Id.* at 17-18.

²⁵⁷ AT&T’s proposed Appendix Numbering § 2.3.

geographic numbers from a LEC. Neustar sought guidance from the FCC. UTEX reports that the FCC, with full knowledge of the nature of the application, instructed Neustar to proceed with issuance of the numbers.²⁵⁸

In summary, UTEX believes it has a right to provide 500 exchange service under the ICA, and proposes that 500 service calls originated on AT&T Texas's network be routed onto "local" trunks as FTA § 251(b)(5) traffic. Given the absence of other technologies on the AT&T Texas network, UTEX is willing to accept SS7 signaling (implemented as part of interconnection) for the routing of these calls.²⁵⁹ UTEX cites the FCC's *Time Warner Order*,²⁶⁰ stating that it specifically allowed CLECs to interconnect under FTA § 251(c)(2) for the mutual exchange of traffic to and from VoIP providers, as support for its position. Further, UTEX proposes the reciprocal compensation rate of \$0.0007 per minute of use set forth in the *Core Mandamus Order*.²⁶¹

AT&T Texas's Position

In Attachment NIM Section 1.8, UTEX seeks to insert language, "AT&T TEXAS agrees not to block or deny the passage of any traffic." AT&T Texas argues that the Commission should reject this language, because it does not take into account the fact that blockage may be a result of insufficient capacity on UTEX's trunks.²⁶² As written, the proposed language could hold AT&T Texas liable for a situation over which it has no control.²⁶³

AT&T Texas suggests that UTEX has another purpose for this language, that of obligating AT&T Texas to perform switch translations to allow free routing of UTEX's 500 numbers. The Commission should reject this language as an attempt by UTEX to obtain switched access services for free rather than under AT&T Texas's tariff.²⁶⁴ AT&T Texas offers a tariffed service

²⁵⁸ UTEX Ex. 3, Feldman Rebuttal, at 23.

²⁵⁹ UTEX Ex. 3, Feldman Rebuttal, at 25.

²⁶⁰ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC 06-55, DA 07-79, Memorandum Opinion and Order, 22 FCC Rcd. 3513 (rel. Mar. 1, 2007).

²⁶¹ UTEX Ex. 3, Feldman Rebuttal, at 27.

²⁶² AT&T Texas Ex. 19, Direct Testimony of Mark Neinast (Neinast Direct), at 22:8-13.

²⁶³ AT&T Initial Br. at 30.

²⁶⁴ *Id.* at 30.

titled Advanced Carrier Identification Service (ACIS) for the switch translations and routing of a carrier's 500 traffic.²⁶⁵ ACIS was created as a service to be purchased by IXC's so that their customers could place calls from various geographic locations at special rates different from traditional long-distance rates. *See In the Matter of MCI Telecommunications Corporation Application for Review of the Ameritech Operating Companies*, 12 FCC Rcd. 16565, 1997 WL 612729 at ¶ 2 (Oct. 7, 1997) ("Interexchange carriers (IXCs) that purchase this access service offer to end users a retail 500 service, a relatively new service that provides 'follow me' capabilities to a customer.") While UTEX, like all other CLECs, can purchase this access service as an access carrier, UTEX is not entitled to get it for free.²⁶⁶

AT&T Texas states that UTEX has deliberately confused the issue of opening non-geographic Service Access Codes, such as 5YY and 9YY, with that of opening regular NPA-NXX codes. The former codes are non-geographic and not related to local exchange or interconnection available to LECs under FTA §§ 251 and 252. In almost all cases, a carrier using these non-geographic numbers must be able to route traffic between exchanges and to actual telephone numbers or locations, and thus must function as an IXC. IXCs are the normal providers of this function and this is why access charges apply.²⁶⁷

AT&T Texas states that 500 numbers are a terminating service, similar to 800 service offered by an IXC. For this service, there is a Service Access Code (SAC) customer who purchases SAC services from the IXC. The IXC routes calls to the SAC customer's service access code. Access charges are paid by the SAC customer so that the person originating the call does not have to pay them, but the access charges still apply.²⁶⁸ AT&T states that UTEX provided no evidence to indicate that it would not use 500 numbers any differently than would an IXC. It was described during the hearing that 500 and 800 calls would originate on AT&T Texas's network to a UTEX Customer.²⁶⁹ AT&T Texas states that UTEX is attempting to game the

²⁶⁵ AT&T Texas Ex. 19, Neinast Direct, at 20:16–21:22.

²⁶⁶ AT&T Initial Br. at 31.

²⁶⁷ AT&T Reply Br. at 18.

²⁶⁸ Tr. at 125:17-20 (Apr. 13, 2010).

²⁶⁹ *Id.* at 126.

system by obtaining for free an originating access service through an ICA, bypassing AT&T Texas's tariff. The Commission should not permit this.²⁷⁰

Arbitrators' Decision

The Arbitrators conclude that AT&T Texas must perform switch translations for UTEX's 500 numbers. No law requires UTEX to serve its ESP customers using 500 numbers purchased from AT&T Texas's tariff rather than using UTEX's own 500 numbers. The Arbitrators also conclude, however, that UTEX's proposed language could cause AT&T Texas to breach the ICA through no fault of its own in cases in which UTEX trunk capacity is exceeded. The Arbitrators, therefore, adopt UTEX's proposed ICA language with modification:

- 1.8 AT&T Texas agrees not to block or deny the passage of any traffic. Situations in which calls cannot be routed by AT&T Texas due to lack of capacity on UTEX trunks do not constitute blocking of calls by AT&T Texas.

The Arbitrators further conclude that calls made to UTEX's 500 numbers are subject to the same intercarrier compensation rules as other types of calls. UTEX states that it intends to serve ESP customers with its 500 number service. As discussed in the "Inter-carrier Compensation for Traffic Involving UTEX's ESP Customers" section of the Award, the Arbitrators do not agree with UTEX that every communication involving a UTEX ESP customer qualifies as telephone exchange service subject to the Local Traffic provisions of the ICA. Consistent with the Arbitrators' decisions in the "Inter-carrier Compensation for Traffic Involving UTEX's ESP Customers" section of the Award, a call from an AT&T Texas end user to a UTEX 500 number is subject to the Local Traffic provisions of the ICA when the call is routed to a called end user located in the same local calling area as the AT&T Texas end user or when the call is routed through the POP of UTEX's ESP customer located in the same local calling area as the AT&T Texas end user and otherwise qualifies as ESP Traffic.

On the other hand, if UTEX's ESP customer is located outside the local calling area of the AT&T Texas end user and the call is routed to an end user outside that local calling area, then UTEX may be an IXC as discussed in more detail in the "Inter-carrier Compensation for Traffic Involving UTEX's ESP Customers" section of the Award and would, therefore, be subject to originating access charges. Furthermore, to the extent AT&T Texas and UTEX jointly provide

²⁷⁰ AT&T Reply Br. at 19.

access service to a third-party IXC that subscribes to UTEX's 500 number service, that IXC will be subject to the originating access rates as set forth in each party's interstate or intrastate access service tariffs.

The Arbitrators further conclude that a 500 number does not qualify as a CPN for purposes of rating a call because a 500 number is non-geographic and, therefore, cannot be used to determine the location of the calling end user.

The Arbitrators direct the parties to draft compensation provisions for 500 numbers consistent with the above discussion. Because AT&T Texas will be dependent upon UTEX and UTEX's ESP customer to identify the CPN or other routing information of the called end user, the parties' ICA language shall also include audit procedures allowing AT&T Texas to verify the CPN or other routing information to determine the location of the called end user, the POP location of UTEX's ESP customer, and any other information necessary to determine the correct rating of the call. The Arbitrators further note that the burden of proof language for ESP Traffic discussed in the "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers" section of the Award shall apply to all calls that a party asserts qualify as ESP Traffic, including any such calls made to 500 numbers. To the extent that the parties cannot agree on ICA language implementing the decision above, each party shall include its proposed language and the reasons supporting its adoption in the party's exceptions to the PFA.

Transit Services

DPL issues: AT&T NIM 2-15(b), AT&T NIM 3-9, AT&T NIM 6-1(f), AT&T NIM 6-9

UTEX's Position

UTEX states that some of its carrier customers have requested that AT&T Texas route calls addressed to their numbers to UTEX's network for transit.²⁷¹ UTEX contends that AT&T Texas has refused to route calls to the numbers and the Common Language Location Identifier (CLLI) codes the holding carrier has formally specified in the Local Exchange Routing Guide (LERG) when UTEX provides transit service to other carriers.²⁷² UTEX claims that AT&T Texas has avoided establishing a reciprocal compensation arrangement for transit traffic that UTEX can

²⁷¹ UTEX Ex. 3, Feldman Rebuttal, at 28:13-16.

provide to other carriers.²⁷³ UTEX argues that AT&T Texas demands that all third party carriers establish direct interconnection with AT&T Texas, rather than establish indirect interconnection through UTEX while AT&T Texas's voice and data affiliates refuse to establish direct interconnection with UTEX.²⁷⁴ The market result, according to UTEX, is that AT&T Texas has established a monopoly for transit and tandem based services to carriers, as well as to the users and providers AT&T Texas is seeking to have deemed "Carriers."²⁷⁵ UTEX contends that future new entrants interested in IP to IP interconnection are currently faced with a decision as to whether to invest in legacy technology for the sole purpose of interconnecting with the ILEC.²⁷⁶ UTEX claims that if UTEX can provide a transit solution to these new entrants, this unnecessary investment will not have to be made.²⁷⁷

UTEX states that the transit rate is not an issue for UTEX, as long as it is mutual and reciprocal so that it applies both when AT&T Texas provides the transit function and when UTEX provides the transit function.²⁷⁸ With respect to transit services, UTEX states that it would accept SS7 signaling.²⁷⁹ For routing, UTEX proposes that AT&T Texas must perform the requisite switch translations in each LATA where UTEX is interconnected with AT&T Texas, and where code holders choose to use UTEX rather than AT&T Texas for transit service.²⁸⁰ UTEX states that since there is no IXC involved in the call, local trunks should be used.²⁸¹ UTEX's updated language proposes the creation of a separate trunk group for all "transit" traffic.²⁸² For rating of transit traffic, UTEX proposes a mutual rate of \$0.00096 in both

²⁷² *Id.* at 28:13-23.

²⁷³ *Id.* at 29:11-13.

²⁷⁴ *Id.* at 29:13-16.

²⁷⁵ *Id.* at 29:19-21.

²⁷⁶ UTEX Initial Br. at 56.

²⁷⁷ *Id.*

²⁷⁸ UTEX Ex. 3, Feldman Rebuttal, at 32:18-33:2.

²⁷⁹ *Id.* at 34:6.

²⁸⁰ *Id.* at 34:8-10.

²⁸¹ *Id.* at 34:14-15.

²⁸² *Id.* at 34:15-16.

directions for traffic sent by unaffiliated carriers.²⁸³ For affiliated carrier traffic, UTEX proposes a no compensation scheme to prevent “gaming” of interconnection rights.²⁸⁴

UTEX states that it respects the Commission’s decision in Docket No. 28821 on competitively supplied transit and does not seek a different result.²⁸⁵ UTEX claims, however, that AT&T Texas’s proposed language does not contain terms related to UTEX-provided transit/tandem services and that the Arbitrators should either adopt UTEX’s proposed terms or prescribe terms for such transit service.²⁸⁶

AT&T Texas’s Position

AT&T Texas explains that its transit service allows CLECs such as UTEX to utilize AT&T Texas’s network to exchange local, Optional EAS, and intraLATA toll traffic with third party carriers with which the CLECs have no direct interconnection.²⁸⁷ AT&T Texas states that absent AT&T Texas’s transit service, CLECs can interconnect directly with third-party carriers or use the facilities or networks of other carriers to indirectly interconnect with third-party carriers.²⁸⁸ AT&T Texas states that it charges the originating carrier a fee to transit the traffic and the terminating carrier is entitled to charge the originating carrier, not AT&T Texas, for services that it provides in completing the call.²⁸⁹ AT&T Texas states that when it hands off the call to the terminating carrier, it passes to the terminating carrier any calling party originating information, including the originating carrier’s identity that it receives with the transit traffic.²⁹⁰ The terminating carrier can use the originating telephone number and other information that it receives from AT&T Texas to charge the originating carrier the appropriate compensation, whether reciprocal compensation or terminating access.²⁹¹

²⁸³ *Id.* at 34:20-35:1.

²⁸⁴ *Id.* at 35:1-3.

²⁸⁵ UTEX Initial Br. at 56.

²⁸⁶ *Id.*

²⁸⁷ AT&T Ex. 15, McPhee Direct, at 71:7-9.

²⁸⁸ *Id.* at 71:16-19.

²⁸⁹ *Id.* at 71:22-24, 74:8-15.

²⁹⁰ *Id.* at 71:24-72:4.

²⁹¹ *Id.* at 72:4-7.

AT&T Texas contends that transit service is not an FTA § 251(b) or (c) service and therefore is not subject to mandatory negotiation under FTA § 251(a) or arbitration under FTA § 252(b) and that any agreement between the parties is to be a separate, commercial agreement.²⁹² However, AT&T Texas states that it respects the Commission's prior decision in Docket No. 28821, which did not adopt AT&T Texas's position regarding this matter.²⁹³ AT&T Texas proposes the adoption of the transit traffic compensation language awarded to the CLEC Coalition in Docket No. 28821 and stated that there has been no change in law or FCC rules that would warrant a different outcome in this arbitration.²⁹⁴

AT&T Texas contends that UTEX's proposed language omits several important terms and conditions contained in AT&T Texas's transit language.²⁹⁵ As examples, AT&T Texas cites its proposed language in § 4.1 in Attachment 6 to NIM: Intercarrier Compensation, which provides that transit service will not be provided to an IXC or other party for the purpose of avoiding access charges, and its contract language in § 4.2.3, which appropriately sets forth terms and conditions for intraLATA toll transit traffic, which is subject to tariffed access charges.²⁹⁶ In contrast, AT&T Texas argues that UTEX's proposed language 1) does not define transit service; 2) inappropriately includes reciprocal compensation charges for transiting (given that it is the originating carrier, not the transit carrier, who has the obligation to pay reciprocal compensation obligations); 3) does not include any compensation provisions for intraLATA toll transit traffic; and 4) does not include terms and conditions for compensation between the originating and terminating carriers.²⁹⁷

AT&T Texas argues that UTEX's proposal is intended to require AT&T Texas to forgo direct interconnection with carriers with which AT&T Texas has or can readily establish a direct interconnection, if UTEX can persuade those carriers to request placing UTEX between AT&T Texas and them.²⁹⁸ AT&T Texas states that the FTA does not allow UTEX to force AT&T Texas to give up its right to direct interconnection with another carrier to terminate its own

²⁹² AT&T Texas Initial Br. at 163.

²⁹³ AT&T Texas Ex. 15, McPhee Direct, at 72:13-17.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 72:20-21.

²⁹⁶ *Id.* at 72:21-23, 73:21-74:2.

²⁹⁷ *Id.* at 73:6-74:8.

traffic and that AT&T Texas has the right to determine the “most efficient technical and economic” means of handing off calls placed by its own end users to end users served by other carriers.²⁹⁹

Arbitrators’ Decision

Consistent with the Commission’s decision in Docket No. 28821, the Arbitrators conclude that AT&T Texas is required to provide transit services at TELRIC rates. Given AT&T Texas’s ubiquitous network in Texas and the evidence in Docket No. 28821 regarding an absence of alternative competitive transit providers in Texas, the Commission found in Docket No. 28821 that imposing an obligation on AT&T Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks.³⁰⁰

With respect to provision of transit services by UTEX, the Arbitrators note that in Docket No. 28821, the Commission found that in the interest of promoting the entry of alternative transit providers in the market, it is reasonable to permit a CLEC to serve as a transit provider instead of the ILEC.³⁰¹ However, the Commission also recognized that direct interconnection between the originating and terminating carriers, in contrast to indirect interconnection through a third party transit provider, reduces the potential for billing disputes as well as encourages efficient network interconnection.³⁰² Therefore, the Commission concluded in Docket No. 28821 that the terminating carrier shall accept transit traffic if direct interconnection with the originating carrier is unavailable.³⁰³ In other words, the originating carrier’s obligation to route traffic through the transit carrier and pay the transit carrier for its service comes into play only if direct interconnection between the originating carrier and the third party carrier is unavailable. Consistent with the Commission’s decision in Docket No. 28821, the Arbitrators require AT&T Texas to route traffic destined for a third party carrier using UTEX’s transit service and pay

²⁹⁸ AT&T Texas Initial Br. at 31-32.

²⁹⁹ *Id.* at 32.

³⁰⁰ Docket No. 28821, Arbitration Award – Track 1 Issues , Intercarrier Compensation –JT DPL – Final , DPL Issue SBC-17 at page 19 of 84 (February 22, 2005).

³⁰¹ *Id.*, DPL Issue SBC – 18 at page 26 of 84.

³⁰² *Id.*

³⁰³ *Id.*

UTEX for transit service only if direct interconnection between AT&T Texas and the third party carrier is unavailable.

The Arbitrators also adopt the Commission's decision in Docket No. 28821 regarding the billing of transit services, which required AT&T Texas, as a transit carrier, to provide OCN and/or CPN information to the terminating carrier to the extent AT&T Texas receives such information from the originating carrier or can provide such information.³⁰⁴ The Arbitrators impose this obligation reciprocally on UTEX when it serves as the transit carrier. In addition, consistent with the Commission's decision in Docket No. 28821, which affirmed prior determinations on the billing of transit service, the Arbitrators find that regardless of whether the traffic can be identified through CPN or OCN information, the terminating carrier shall be required to directly bill the originating carrier that sends traffic over the transit carrier's network.³⁰⁵ The Arbitrators, therefore, conclude, except for the transit rates discussed herein, which apply when either party purchases the transit service of the other party to send originating calls, the transit carrier is not obligated to pay intercarrier compensation for the traffic exchanged between the originating and terminating carriers and, instead, the terminating carrier should establish separate compensation and billing arrangements with the originating carrier.

The Arbitrators note that the Commission-established rates for transit service in Docket No. 28221 for various types of traffic including local traffic were specific to transit services provided by AT&T Texas. While UTEX refers to the transit rate of \$0.00096, which the Arbitrators note is the transit rate for local traffic approved in Docket No. 28821, UTEX has indicated that the transit rates are not an issue for UTEX, as long as they are mutual and reciprocal so that they apply both when AT&T Texas provides the transit function and when UTEX provides the transit function. AT&T Texas has not objected to the application of the transit rates established by the Commission in Docket No. 28821 for various types of traffic including local traffic. Accordingly, the Arbitrators conclude that the ICA should reflect the Commission-approved transit rates in Docket No. 28821 for the various types of traffic including local traffic.

The Arbitrators decline to differentiate between affiliate and non-affiliate third party carriers for the application of the transit rates, as UTEX proposes. The Arbitrators find that in light of the requirement in FTA § 251(a)(1), which imposes a duty on all telecommunications carriers to

³⁰⁴ *Id.*, DPL Issue SBC – 17 at page 20 of 84.

interconnect directly or indirectly with other telecommunication carriers, it is not appropriate to adopt unique requirements with respect to transit service compensation depending on whether the traffic is exchanged with a third party that is affiliated with either UTEX or AT&T Texas. In addition, the Arbitrators note that the language approved by the Commission in Docket No. 28821 for the CLEC Coalition ICA regarding CLEC provided transit services does not differentiate between affiliate and non-affiliate third party carriers.

The Arbitrators note that AT&T Texas's proposed language on transit service does not reflect all the relevant provisions relating to transit service, including provisions authorizing transit services by a CLEC. Given that AT&T Texas recommends the adoption of the language approved for the CLEC Coalition ICA in Docket No. 28821 and UTEX seeks the same result as the Commission's decision in Docket No. 28821, the Arbitrators adopt §§ 7.0-7.10 in Attachment 12: Compensation on transit service, which was approved by the Commission in Docket No. 28821 for the CLEC Coalition ICA, with modifications. The Arbitrators direct the parties to modify the CLEC Coalition ICA language on transit services such that the provisions apply reciprocally. Furthermore, all references to § 251(b)(5) traffic should be replaced with "local traffic" for reasons delineated in DPL Issue AT&T NIM 6-1. In addition, the last sentence of § 7.9 should be modified as follows:

~~Unless CLEC requests otherwise,~~ The rating for transit calls when CLEC provides the transit service shall be the same between the Parties as the rating for calls transited by SBC TEXAS AT&T TEXAS to or from any similarly situated third party carrier, as set forth in Section 7.2 above.

Finally, the Arbitrators note that that UTEX has proposed language relating to transit services provided by either party for cellular traffic in §§ 8.0-8.2. The Arbitrators conclude that in order to maintain contractual completeness and to avoid compensation disputes, it is appropriate for the section on transit traffic compensation to include provisions on transit services for cellular traffic. The Arbitrators adopt UTEX's proposed language in §§ 8.0-8.2 labeled Compensation for Terminating Cellular Traffic, with modifications. The Arbitrators note that UTEX's proposed language in §§ 8.0-8.1 is substantially similar to the language approved by the Commission in Docket No. 28821 for §14.0 and §14.2 in Attachment 12: Compensation in the CLEC Coalition ICA. In § 8.1, the cross reference relating to the transit rates and indemnification of the transiting party should be corrected to reflect the appropriate sections.

³⁰⁵ *Id.*

With respect to § 8.2, the Arbitrators note that UTEX's proposed language differs from the CLEC Coalition ICA in one respect – UTEX's proposed language requires that the originating party pay the compensation for the traffic to the transiting party while the CLEC Coalition ICA requires the transiting party to pay compensation for the traffic to the terminating party. As discussed above, the Arbitrators find that the transit carrier is not obligated to pay intercarrier compensation for the traffic exchanged between the originating and terminating carriers, and instead the terminating carrier should establish separate compensation and billing arrangements with the originating carrier. Therefore, the Arbitrators modify UTEX's proposed language in § 8.2 as follows so that the transiting party passes appropriate originating information to enable the terminating carrier to seek compensation for the traffic pursuant to relevant sections adopted herein by the Arbitrators:

When traffic is originated by either Party to a CMRS Provider, and the traffic cannot be specifically identified as wireless traffic for purposes of compensation between AT&T TEXAS and CLEC, the traffic will be rated either as Local or Access and the appropriate ~~transit-compensation~~ rates shall be paid by the originating Party to the transiting Party. The delivery of appropriate originating information by the transiting Party and the compensation for the traffic shall be subject to §§ 7.3-7.8.

End User Definition

DPL Issue: AT&T GTC Issue 65

Should the agreement refer to end users as “End Users, End Use Customers, or Customers” as UTEX proposes, or as End Users?

Definition of End User and Customer

UTEX's Position

UTEX proposes definitions for three terms: End Use Customer, End User, and Customer.

51.31 End Use Customer.

A non wholesale customer that receives local, non-toll telecommunications services, as distinct from long distance, toll telecommunications service.

51.32 End User.

End User means any Customer of a telecommunications service that is not a carrier except that a carrier or Party shall be deemed to be an “end user” when such carrier or Party uses a telecommunications service for administrative

purposes. A person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an “end user” if all resale transmissions offered by such reseller originate on the premises of such reseller. A person or entity that utilizes a Party’s telecommunications services shall be deemed to be an “end user” even if such an entity uses all or part of the service as an input to the Person or entity’s customers’ own service.

51.29 Customer.

The person, firm, corporation or other entity which orders or obtains service from a Party and is responsible for the payment of charges and for compliance with the Party’s regulations and the contract, tariff and/or Service Order.

UTEX objected to AT&T Texas’s proposed definition for “End User,” arguing that it could be interpreted to mean that an enhanced/information service provider is not an “end user,” at least for some purposes.³⁰⁶ AT&T’s proposed definition for “End User” is as follows:

“End User” or “End User Customer” means any individual, business, association, corporation, government agency or entity other than an Interexchange Carrier (IXC), Competitive Access Provider (CAP) or Wireless Carrier (also known as a Commercial Mobile Radio Service (CMRS) provider) that subscribes to Telecommunications Services provided by either of the Parties and does not resell it to others. As used herein, this term does not include any of the Parties to this Agreement with respect to any item or service obtained under this Agreement.

UTEX states that AT&T Texas’s conclusion that an enhanced/information service provider is not an “end user” may be based on language in AT&T Texas’s proposed definition limiting the class of end users to a person “that subscribes to Telecommunications Services provided by either of the Parties and does not resell it to others.”³⁰⁷ According to UTEX, ESPs subscribe to Telecommunications Service that some might say they resell to others after “adding” an enhanced/information component. However, UTEX points out that the FCC’s definition of “enhanced service” and the statutory definition of “information service” contemplate that enhanced/information services are provided using “common carrier facilities” and/or “via telecommunications.”³⁰⁸ UTEX asserts that the FCC has repeatedly held that ESPs are end users and not carriers, and an “end user” under FCC rules is anyone that is not a carrier, regardless of whether that entity uses a telecommunications input obtained “at wholesale” in order to supply

³⁰⁶ UTEX Ex. 1, Feldman Direct, at 236:18-20.

³⁰⁷ *Id.* at 237:1-2.

³⁰⁸ *Id.* at 237:4-7.

their non-carrier output. UTEX states that if ESPs are not end users, as AT&T Texas would argue under its proposed definition, then ESPs would be treated as carriers.

While UTEX acknowledges that the Commission approved AT&T Texas's proposed definition for "End User" in Docket No. 28821, UTEX claims that the Commission may not have intended for ESPs to be treated as carriers when it approved that definition.³⁰⁹ First, UTEX asserts that in Docket No. 28821, the issue of whether ESPs that provide IP-originating type service are "end users" or "carriers" never came up because the Commission excluded from consideration any issue, resolution, or contract terms that dealt with VoIP other than so-called "IP-in-the-Middle."³¹⁰ Second, despite the Commission's inclusion of AT&T's proposed definition of "end user" in Docket No. 28821, the actual ICA terms treat calls from PSTN to dial-up ISPs as either "local traffic" if the traffic is not FX traffic, or as FX traffic. UTEX contends that because these calls are eligible to be routed over "local" interconnection trunks rather than "access trunks, ISPs are treated as end users."³¹¹

UTEX argues that AT&T Texas's interpretation of its proposed definition could result in calls to and from ESPs being routed over access trunks and subject to access charges.³¹² In addition to the inability of UTEX to secure UNE loops to ESP premises, as explained in greater detail below,³¹³ UTEX contends that if AT&T Texas's proposed definition is approved and ESPs are not deemed to be end users, then UTEX may not be able to assign a number to an ESP.³¹⁴ In addition, UTEX asserts that in the event UTEX wins an ESP customer that AT&T Texas currently serves, then AT&T Texas may refuse to port out a number currently used by that ESP customer because AT&T Texas may not consider ESPs to be end users.³¹⁵ Furthermore, with respect to 911 service, UTEX expresses concern that it will not be able to use the 911 trunks secured through its ICA if an ESP is involved because AT&T Texas may contend that ESPs are

³⁰⁹ *Id.* at 236:1-6, 237:14-20.

³¹⁰ *Id.* at 237:20-22.

³¹¹ *Id.* at 237:22-238:5.

³¹² *Id.* at 238:9-11.

³¹³ *Id.* at 238:14-20.

³¹⁴ *Id.* at 239:6-7.

³¹⁵ *Id.* at 239:7-9.

not end users.³¹⁶ UTEX also states that it may not be able to compete with AT&T Texas to support interconnected VoIP providers in their accomplishment of the FCC's requirement that they have 911 capabilities, because AT&T Texas may assert that UTEX can support 911 only for "end users" and that ESPs, including interconnected VoIP providers, are not end users.³¹⁷

AT&T Texas's Position

AT&T Texas states that the Commission should adopt AT&T Texas's proposed definition of "End User" or "End User Customer" because its definition is identical to the definition the Commission ordered to be included in the ICAs in Docket No. 28821.³¹⁸ AT&T Texas proposes to define "End User" or "End User Customer" as follows:

"End User" or "End User Customer" means any individual, business, association, corporation, government agency or entity other than an Interexchange Carrier (IXC), Competitive Access Provider (CAP) or Wireless Carrier (also known as a Commercial Mobile Radio Service (CMRS) provider) that subscribes to Telecommunications Services provided by either of the Parties and does not resell it to others. As used herein, this term does not include any of the Parties to this Agreement with respect to any item or service obtained under this Agreement.

AT&T Texas states that the test of a definition is how it works in the ICA.³¹⁹ AT&T Texas points out that in the context of 911 service, it is the 911 caller's individual name, address and telephone number that needs to be populated in the 911 database, and the 911 caller is an End User – not some generally defined Customer, and the E911 attachment in the ICA provides terms and conditions reflecting the parties' obligations regarding 911 service.³²⁰ With respect to undisputed language in AT&T Texas's GTC §§ 22.2.1 and 22.3.1 regarding requests from law enforcement for information, AT&T Texas argues that the provisions are clearly intended to apply to an individual end user and not some generally defined Customer.³²¹ AT&T Texas refutes UTEX's insinuation that AT&T Texas's definition of "End User" would have untoward consequences when the term is used in the context of local number portability (LNP). AT&T

³¹⁶ *Id.* at 239:12-14.

³¹⁷ *Id.* at 239:14-17.

³¹⁸ AT&T Texas Ex. 21, Direct Testimony of Patricia H. Pellerin (Pellerin Direct), at 58:21-25.

³¹⁹ AT&T Texas Initial Br. at 42.

³²⁰ AT&T Texas Ex. 21, Pellerin Direct, at 60:21-24; AT&T Initial Br. at 42-43.

³²¹ AT&T Texas Ex. 21, Pellerin Direct, at 61:2-5.

Texas explains that its proposed definition of the term “End User” would allow an end user desiring to change his/her local exchange service provider but retain his/her telephone number by requesting LNP.³²² With respect to provision of unbundled loops to an ESP’s premises, AT&T Texas states that it is not proposing to change the manner in which unbundled loops are offered today, and AT&T Texas’s definition of “End User” does not have that effect.³²³

AT&T Texas objects to UTEX’s proposed definition of “End User,” “End User Customer,” and “Customer.” AT&T Texas argues that the most important potential impact of the definition of “End User” and “End User Customer” is in connection with UTEX’s attempt to persuade the Commission to excuse UTEX from liability for access charges payable to AT&T Texas for the termination of what UTEX characterizes as new technology traffic from its purported ESP customers.³²⁴

AT&T Texas contends that UTEX’s definition of “End User” is inconsistent with the Commission’s decision in Docket No. 28821 because it provides that a customer of UTEX may be an End User even if it uses UTEX’s service to provide a service to others.³²⁵ AT&T Texas points to the discussion in the February 23, 2005 Arbitration Award in Docket No. 28821 regarding end-user, where it was determined that a carrier is an end user when actually consuming the retail service, as opposed to using the service as an input to another communications service.³²⁶ Furthermore, AT&T Texas argues that UTEX’s proposed definition of “End Use Customer” improperly seeks to limit End User Customers to those who receive local services and thereby inappropriately exclude users of non-local toll services (*e.g.*, foreign exchange services).³²⁷

AT&T Texas states that there is no need for a contractual definition of the term “Customer,” which has no meaning in the ICA other than its commonly understood meaning and which serves no useful purpose in the context of the parties’ ICA.³²⁸

³²² AT&T Texas Ex. 22, Rebuttal Testimony of Patricia H. Pellerin (Pellerin Rebuttal), at 10:17-11:2.

³²³ *Id.* at 11:3-9.

³²⁴ AT&T Texas Initial Br. at 41.

³²⁵ *Id.* at 42.

³²⁶ AT&T Texas Ex. 21, Pellerin Direct, at 59:30-60:1.

³²⁷ *Id.* at 60:1-4.

³²⁸ *Id.* at 60:6-10.

For all of these reasons, AT&T Texas urges the adoption of AT&T Texas's proposed definition of "End User" or "End User Customer" and the use of the term "End User" throughout the GTCs where UTEX has proposed using its combination of terms of "End User" or "End User Customer" or "Customer."³²⁹

Arbitrators' Decision

The Arbitrators conclude that the term "End User" should be defined as follows:

"End User" means any third party entity that is the ultimate retail consumer of a Telecommunications Service. As used herein, this term does not include any of the Parties to this Agreement with respect to any item or service obtained under this Agreement.

This definition is consistent with prior Commission decisions on the definition of the term "End User." For instance, in Docket No. 26904, the Arbitrators examined the common usage and the technical meaning of the term "End User."³³⁰ The Arbitrators in Docket No. 26904 noted that American Heritage Dictionary defines "end user" as "ultimate consumer of a product, especially the one for whom the product has been designed." The Arbitrators also cited the technical meaning of end user in Newton's Telecom Dictionary as "[T]he occupant of the premises who uses and pays for the telephone service received and does not resell it to others."³³¹ In Docket No. 28821, the Commission affirmed that the term "end user" refers to the ultimate retail consumer of the service when it noted that "nothing prohibits an IXC, CAP or CMRS provider or other carrier from being an end-user to the extent that such carrier is the *ultimate retail consumer of the service* (e.g. a CLEC provides local exchange service to an IXC at its administrative offices)."³³² In other words, "a carrier is an end user when actually consuming the retail service, as opposed to using the service as an input to another communications service."³³³

The Arbitrators find that an ESP customer is an end user if it purchases service from UTEX for its own administrative purposes (e.g., to place and receive calls). In such a case, the ESP will be the ultimate retail consumer of the service and will not be using the service as an input to a

³²⁹ *Id.* at 61:6-11.

³³⁰ *Complaint of Southwestern Bell Telephone, LP for Post Interconnection Agreement Dispute Resolution with El Paso Networks, LLC*, Docket No. 26904, Arbitration Award at 10 (Feb. 3, 2004).

³³¹ *Id.*

³³² Docket No. 28821, Arbitration Award—Track 1 Issues at 30 (Feb. 23, 2005) (emphasis added).

³³³ *Id.*

service it provides to its customers. When receiving service as the ultimate retail consumer of the service, the definition of the term “end user” will not preclude the ESP customer from receiving 911 service and will allow an ESP to retain its telephone number by requesting local number portability.

The Arbitrators note that to the extent UTEX is interconnecting with AT&T Texas to support VoIP providers, the definition of the term “End User” is not intended to prevent UTEX from fulfilling its interconnection obligations to enable VoIP providers to serve their own retail customers. In such cases, the ultimate retail customer of the VoIP provider would meet the definition of the term “End User.”

With respect to the use of the term “End User” or “Customer” in AT&T Texas’s GTC §§ 22.2.1 and 22.3.1 regarding requests from law enforcement for information, the Arbitrators address this issue under DPL issue AT&T GTC 46.

The Arbitrators decline to adopt UTEX’s proposed definition of “End Use Customer” because it inappropriately excludes users of non-local toll services and includes consumers of telecommunication services who may not be the ultimate retail consumers of a telecommunications service. The Arbitrators also decline to adopt AT&T’s proposed definition of “end user,” which was approved by the Commission in Docket No. 28821. The Arbitrators note that the definition adopted by the Arbitrators for “End User” not only accomplishes the intent of AT&T Texas’s proposed definition, in that the term “End User” is limited to entities, including carriers, who are the ultimate retail consumers of a telecommunications service, but is broader than AT&T’s proposed definition in that it encompasses entities who are the ultimate retail consumers of services provided by wholesale customers such as VoIP providers of either Party.

The Arbitrators note that the AT&T Texas has proposed the same definition for the terms “End User” and “End User Customer.” Given that both terms have the same meaning, all references to “End User Customer” in the ICA shall be replaced with the term “End User.” Similarly, the term “End Use Customer” as proposed by UTEX shall be replaced with the term “End User.”

The Arbitrators decline to adopt UTEX’s proposed definition for the term “Customer” because that definition is overbroad and vague. In its *Time Warner* decision, the FCC found that the rights of telecommunications carriers to § 251 interconnection are limited to those carriers

that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.³³⁴ Furthermore, FCC Rule 51.00(b) permits a telecommunications carrier such as UTEX that has interconnected or gained access under FTA §§ 251(a)(1), 251(c)(2), and 251(c)(3) of the Act, to offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.³³⁵ The Arbitrators note that UTEX's proposed definition of "Customer" does not limit the service obtained from either party to telecommunications service or information service, but rather makes a general reference to "service." Furthermore, the Arbitrators find it unnecessary to address in a definition the issues of payment and compliance responsibilities of an entity obtaining service from either party. For these reasons, the Arbitrators decline to adopt UTEX's definition of "Customer."

While the Arbitrators decline to adopt UTEX's proposed definition, the Arbitrators conclude that the ICA should include a definition for the term "Customer." The Alpheus ICA included a definition for the term "Customer," but that definition referred only to telecommunications services provided by a party and did not include information services. Consequently the Alpheus ICA definition of "Customer" shall be modified as follows and used in the ICA:

"Customer" means any third party entity, including but not limited to another telecommunications carrier, that obtains Telecommunications Service or Information Service from either Party, whether at wholesale or retail. The terms "End User" and "Customer" are not interchangeable for purposes of this Agreement. Based on the definition of End User in [insert ICA section number], all End Users are Customers but not all Customers are End Users.

The use of this term in the ICA is addressed under DPL Issues AT&T GTC 14, 30, and 46.

UNE Loops to UTEX's ESP Customers

Relevant Statutes and Rules

- FCC Rule 51.319(a): "The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises."

³³⁴ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC 06-55, DA 07-79, Memorandum Opinion and Order ¶ 14, FCC Rcd. 3513 (rel. Mar. 1, 2007).

³³⁵ 47 C.F.R. § 51.100(b).

UTEX's Position

UTEX asserts that, soon after the enactment of the FTA in 1996, CLECs began to serve ISPs, usually through a DS-1 UNE Loop to the ISP's point of presence.³³⁶ For example, UTEX states that it currently serves an ISP in Midland and Lubbock through AT&T Texas UNE loops.³³⁷ According to UTEX, no one has ever seriously questioned the proposition that a CLEC can use a UNE loop to connect to an ESP customer.³³⁸ UTEX states that AT&T Texas is now attempting to change the current rule that a CLEC may connect to an ESP customer through a UNE loop.³³⁹ UTEX asserts that AT&T Texas's proposal would radically change how the industry has operated since 1996 and is not allowed by the FTA and the FCC's rules and decisions.³⁴⁰ UTEX further states that AT&T Texas's position is that it can provide a PRI service to an ESP using a loop but that a CLEC cannot.³⁴¹

UTEX states that the Commission addressed this issue in Docket No. 26904 and that UTEX does not seek to change that decision but rather to implement it.³⁴² UTEX argues that the Commission concluded in that docket that if a customer is a carrier who will use the facility for anything other than administrative purposes, then it is a carrier and not an end user.³⁴³ According to UTEX, AT&T Texas wants to expand the decision in Docket No. 26904. UTEX states that ESPs do not provide telecommunications service and, therefore, cannot be considered carriers. Therefore, under the decision in Docket No. 26904, an ESP must be considered an end-user. UTEX argues that AT&T Texas lacks the authority to decide whether an entity that uses telecommunications service as an input to provide a non-telecommunications service output (e.g., internet access or VoIP) is a zombie carrier and must be treated as a carrier rather than as an end user. Finally, UTEX argues that several FCC rules prohibit AT&T Texas from placing

³³⁶ UTEX Initial Br. at 37; *see* UTEX Ex. 1, Feldman Direct, at 238:21-239:2.

³³⁷ Tr. (Feldman) at 535:9-12 (Apr. 15, 2010).

³³⁸ UTEX Initial Br. at 38.

³³⁹ *Id.* at 40.

³⁴⁰ *Id.* at 40.

³⁴¹ *Id.* at 40.

³⁴² UTEX Reply Br. at 56-57.

³⁴³ *Id.* at 57.

restrictions on the use of UNE loops or denying access to UNE loops for service to UTEX's non-carrier ESP customers.³⁴⁴

AT&T Texas's Position

AT&T Texas states that its proposed language allows UTEX to purchase UNE loops that it provides to a customer who in turn uses the loops for placing and receiving calls.³⁴⁵ But AT&T Texas's language does not allow UTEX to use UNE loops to enable its wholesale customers like Transcom to route traffic. In that case, according to AT&T Texas, UTEX must purchase those facilities from another vendor, buy them out of AT&T Texas's special access tariffs, or provide them itself.

AT&T Texas states that whether a customer such as Transcom is characterized as an ESP or a carrier, its function is essentially that of a Competitive Access Provider (CAP), which sells transmission circuits and other services for the purpose of routing calls.³⁴⁶ AT&T Texas argues that in Docket Nos. 25188 and 28821, the Commission rejected language that would have permitted a CLEC to purchase UNE loops for sale to such a provider.

According to AT&T Texas, in Docket No. 25188, the Commission concluded that the term "end user" must be defined in such a way that UNE loops are distinguished from other network elements that provide transmission paths between end points not associated with end users.³⁴⁷ AT&T Texas states that, in Docket No. 28821, the Commission reaffirmed that ruling and rejected a proposal similar to UTEX's proposal here that would replace the term "end user" with the term "customer." The Arbitration Award in that docket states that "a CLEC cannot obtain a UNE loop to establish a transmission facility to a premise [sic] that is not an end-user premise [sic]. Instead of using UNE loops, the CLEC may obtain the transmission facilities it seeks to customers who are not end users from other means such as special access from SBC Texas or from other telecommunication carriers."³⁴⁸ AT&T Texas states that the Commission's reasoning in that docket applies here. AT&T Texas states that the Commission also held in that docket that

³⁴⁴ UTEX Initial Br. at 184-186.

³⁴⁵ AT&T Texas Initial Br. at 33.

³⁴⁶ *Id.* at 33.

³⁴⁷ *Id.* at 33 (citing Docket No. 25188, Revised Arbitration Award at 15 (July 29, 2002)).

³⁴⁸ *Id.* at 34 (quoting Docket No. 28821, Arbitration Award – Track I, Definitions-Joint DPL-Final, SBC Issue No. 2 [MCIIm Def. 1] at 1-2. (Feb. 23, 2005)).

a CLEC may purchase UNE loops to serve carriers when they are “actually consuming the retail service,” such as when the carrier uses the loop to place and receive calls from its administrative office.³⁴⁹ AT&T Texas states that UTEX’s proposed definition of end user also inappropriately attempts to exclude users of non-local toll services (*e.g.*, FX services) from the definition.³⁵⁰

AT&T Texas states that its proposed definition of the term “end user” is the same definition approved in Docket No. 28821³⁵¹ and will impose the same appropriate restrictions on UTEX’s use of UNE loops.³⁵² AT&T Texas further states that UTEX is attempting to change the law by redefining ESPs so that they are end users. According to AT&T Texas, ESPs have never been end users when they serve, as Transcom does, as a router of traffic for termination on the PSTN. AT&T Texas asserts that it is not proposing to change the manner in which unbundled loops are offered today.³⁵³

AT&T Texas argues that UTEX’s position that a dichotomy exists under the FTA whereby an entity is either a carrier or an end user, has no support in the FTA or the FCC’s rules.³⁵⁴ According to AT&T Texas, FCC orders refute UTEX’s claim that ESPs are treated as end users for any and all purposes.³⁵⁵ AT&T Texas states that the FCC’s definition of end user illustrates the flaw in UTEX’s argument because the term sometimes includes carriers within the definition of end users “when such carrier uses a telecommunications service for administrative purposes.”³⁵⁶ AT&T Texas also states that the FCC’s rules indicate that an ESP will have to purchase special access service when it wants to use ILEC facilities for more than simply placing calls to and receiving calls from its end user customers.³⁵⁷ AT&T Texas disagrees with UTEX’s argument that the current or prior versions of the Alpheus ICA would achieve a different

³⁴⁹ *Id.*; AT&T Texas Ex. 21, Pellerin Direct, at 59:26-60:1.

³⁵⁰ AT&T Texas Ex. 21, Pellerin Direct, at 60:1-5.

³⁵¹ *Id.* at 58:21-59:5.

³⁵² AT&T Texas Initial Br. at 34.

³⁵³ AT&T Texas Ex. 22, Pellerin Rebuttal, at 11:3-9.

³⁵⁴ AT&T Texas Reply Br. at 20.

³⁵⁵ *Id.* at 20-21 (citing In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Public Rulemaking, 4 FCC Rcd. 3983, 1989 WL 512039 at ¶¶ 39, 41-42 (May 9, 1989); In the Matter of GTE Telephone Operating Cos., 13 FCC Rcd 22,466, 1998 WL 758441 at ¶ 1 (Oct. 30, 1998)).

³⁵⁶ AT&T Texas Reply Br. at 21 (citing 47 C.F.R. § 69.2(m)).

³⁵⁷ *Id.* at 21 (citing 47 C.F.R. § 69.5(c)).

result.³⁵⁸ AT&T Texas states that UTEX is simply trying to relitigate what Alpheus (formerly known as El Paso Networks) lost years ago.³⁵⁹

Arbitrators' Decision

As explained above, the Arbitrators have adopted the following definition:

“End User” means any third party entity that is the ultimate retail consumer of a Telecommunications Service. As used herein, this term does not include any of the Parties to this Agreement with respect to any item or service obtained under this Agreement.

Under this definition, UTEX will ordinarily not be permitted to purchase UNE loops from AT&T Texas for provisioning to UTEX's ESP customers.

FCC Rule 51.319(a) states that a UNE loop runs between an ILEC central office and “an end-user customer premises.”³⁶⁰ If a network element qualifies as a UNE loop, then a CLEC may purchase the element at TELRIC prices.³⁶¹ Taking these two rules together, a CLEC may not purchase a network element at TELRIC prices to the premises of a person that is not an end user. As the Commission has previously recognized, “[t]he use of the term ‘end user’ is necessary in order to distinguish unbundled network element (UNE) loops from other UNEs and other network elements that provide transmission paths between end points not associated with end users, such as interoffice transport.”³⁶²

UTEX proposes that the Commission adopt language that would allow UTEX to purchase UNE loops for provisioning to its ESP customers. This proposal is inconsistent with prior Commission decisions. Docket No. 26904 involved a post-interconnection dispute in which a CLEC sought to provision UNE loops to the cell sites of its cellular company customer. The Arbitrators in that docket looked to a number of common and technical definitions of “end user customer premises” to determine the meaning of that phrase as used in the parties' ICA.³⁶³ The

³⁵⁸ *Id.* at 22.

³⁵⁹ *Id.* at 23.

³⁶⁰ 47 C.F.R. § 51.319(a).

³⁶¹ *See* 47 U.S.C. § 251(c)(3); 47 C.F.R. §§ 51.503, 51.505.

³⁶² *Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company*, Docket No. 25188, Order Approving Revised Arbitration Award and Interconnection Agreement at 2-3 (Aug. 31, 2004).

³⁶³ *Complaint of Southwestern Bell Telephone, LP for Post Interconnection Agreement Dispute Resolution with El Paso Networks, LLC*, Docket No. 26904, Arbitration Award at 10-11 (Feb. 3, 2004).

Arbitrators found that, for purposes of the parties' ICA, the phrase meant "the location in which the buyer and ultimate consumer of the service resides."³⁶⁴ Applying that definition to the dispute before them, the Arbitrators concluded that the CLEC could not purchase UNE loops to the cell sites of its cellular company customer because the cellular company's customers were the ultimate consumers of the service, rather than the cellular company itself.

The Commission reaffirmed this decision in Docket No. 28821. In the Arbitration Award in that docket, the Commission stated, "nothing prohibits an IXC, CAP [competitive access provider] or CMRS provider or other carrier from being an end-user to the extent that such carrier is the *ultimate retail consumer* of the service (e.g., a CLEC provides local exchange service to an IXC at its administrative offices)."³⁶⁵ The Commission further explained that "a carrier is an end user when actually consuming the retail service, as opposed to using the service as an input to another communications service."³⁶⁶

Under the definition of End User adopted by the Arbitrators, network elements to UTEX's ESP customers will ordinarily not be classified as UNE loops that UTEX can purchase at TELRIC prices. Rather than consuming the service provided by the network element itself, a UTEX ESP customer will ordinarily use that service as an input to the communications service that the ESP provides to its customers. Network elements to a UTEX ESP customer will qualify as UNE loops, however, when the ESP customer uses the service provided by the network elements for the ESP's own administrative purposes (e.g., to place and receive calls).³⁶⁷ In such a case, the ESP will be the ultimate retail consumer of the service and will not be using the service as an input to a service it provides to its customers.

UTEX proposes to use language based in part on the FCC's definition of end user for purposes of the FCC's access charge rules. While the FCC has defined ESPs as end users for purposes of those rules,³⁶⁸ the FCC has not stated that an ESP qualifies as an end user for purposes of the UNE loop definition in FCC Rule 51.319(a). Nor has the FCC stated that a CLEC may purchase UNE loops for provisioning to the CLEC's ESP customers. Furthermore,

³⁶⁴ *Id.* at 11.

³⁶⁵ Docket No. 28821, Arbitration Award—Track 1 Issues at 30 (emphasis added).

³⁶⁶ *Id.* at 30 (emphasis in original).

³⁶⁷ *See* Docket No. 26904, Arbitration Award at 12.

the FCC has expressly recognized a distinction between Internet service providers (a class of ESPs) and end users. In an order addressing an ILEC's resale obligations, the FCC stated:

DSL services sold to Internet Service Providers are not targeted to end-user subscribers, but instead are targeted to Internet Service Providers that will combine a regulated telecommunications service with an enhancement, Internet service, and offer the resulting service, an unregulated information service, to the ultimate end-user.³⁶⁹

This language shows that the FCC does not always consider ESPs to be end users with respect to an ILEC's resale obligations. The Arbitrators conclude, therefore, that the FCC's definition of end user for access charge purposes, under which an ESP qualifies as an end user, is not applicable to the issue of proper uses of UNE loops.

UTEX states that the Commission concluded in Docket No. 26904 that a person must either be a carrier or an end user. According to UTEX, ESPs are not carriers and, therefore, must be considered end users for purposes of access to UNE loops. While the Commission did recognize a distinction between carriers and end users in that docket, it did not state that a non-carrier must necessarily be an end user. And, indeed, the Commission did not address at all whether an ESP qualifies as an end user. As explained above, the Commission *has* defined an end user as the person that is the ultimate retail consumer of a service.

UTEX asserts that CLECs have purchased UNE loops for provisioning to ESP customers since shortly after the enactment of the FTA in 1996 and that no one has ever seriously questioned this practice.³⁷⁰ Even assuming that is true, the mere fact that there is no contrary authority does not establish that this practice is consistent with the FCC's definition of UNE loops.

UTEX asserts that AT&T Texas may provide a PRI service to serve ESP customers using a loop but that AT&T Texas's proposed language would require UTEX to serve those customers using special access facilities, which would be uneconomic. Even if true, UTEX's assertion does not bear on whether its ESP customers qualify as end users. As explained above, UTEX's ESP

³⁶⁸ See section titled "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers" in this Award, addressing intercarrier compensation.

³⁶⁹ *In the Matters of Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC 98-147, Second Report and Order ¶ 17, 1999 WL 1016337 (rel. Nov. 9, 1999) (*Advanced Services Resale Order*).

³⁷⁰ The only evidence cited by UTEX in support of this proposition is the fact that UTEX uses UNE loops to access an ESP customer in Midland and Lubbock. Tr. (Feldman) at 535:9-12 (Apr. 15, 2010).

customers do not generally qualify as end users, so AT&T Texas has no obligation to provide loops to those customers at TELRIC prices.

UTEX asserts that FCC rules prohibit AT&T Texas from restricting use of or denying access to UNEs. But those rules apply only to network elements that qualify as UNEs.³⁷¹ To the extent that a network element does not qualify as a UNE, such as when a loop is not provisioned to an end user, the FCC rules cited by UTEX do not apply.

Finally, AT&T Texas states that it does not intend to change the manner in which it offers UNE loops today.³⁷² While UTEX asserts that it has procured UNE loops from AT&T Texas to an ESP customer in Midland and Lubbock,³⁷³ the Arbitrators interpret AT&T Texas's position to mean that it intends to allow UTEX to procure UNE loops to serve only the administrative needs of an ESP customer rather than to allow an ESP customer to use a UNE loop to route traffic.

Resale Obligations with Respect to ESPs

Relevant Statutes and Rules

- FTA § 251(c)(4) imposes a duty on incumbent LECs to offer certain services for resale at wholesale rates. Specifically, FTA § 251(c)(4) requires an ILEC:
 - (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers;
 - (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

UTEX's Position

UTEX argues that AT&T Texas's contention that the resale obligations under FTA § 251(c)(4)(A) apply to "end users" is incorrect. UTEX argues that FTA § 251(c)(4) does not use the term "end users;" it refers to "any telecommunications service that the carrier provides at

³⁷¹ 47 C.F.R. §§ 51.309, 51.311, 51.313.

³⁷² AT&T Texas Ex. 22, Pellerin Rebuttal, at 11:3-9; AT&T Texas Initial Br. at 43.

³⁷³ Tr. (Feldman) at 535:9-12 (Apr. 15, 2010).

retail to subscribers who are not telecommunications carriers.” UTEX asserts that there may well be certain “subscribers that are not telecommunications carriers” who are also not “end users.”³⁷⁴ UTEX also questions whether UTEX could secure an AT&T Texas service and resell it to an ESP under AT&T Texas’s interpretation. UTEX argues that ESPs are end users but points out that AT&T Texas’s position is that ESPs are not end users.³⁷⁵

AT&T Texas’s Position

AT&T Texas states that the Resale attachment should refer to the end user customer of a resold service, with the term “end user” as defined by AT&T Texas.³⁷⁶ AT&T Texas claims that the term “User” proposed by UTEX for several provisions of the Resale attachment is unsupported with any definition of the term.³⁷⁷ Similarly, the term “Customer” as proposed by UTEX is not as descriptive as AT&T Texas’s defined term “End User,” and AT&T Texas’s retail services are sold to the same class of customer (*i.e.*, End Users) as the underlying retail service and not to other types of customers.³⁷⁸ AT&T Texas also notes the prohibition on cross-class selling between different categories of subscribers in the FTA and states that its proposed language appropriately prohibits UTEX’s resale of AT&T Texas’s services to other carriers.³⁷⁹

Arbitrators’ Decision

The Arbitrators conclude that the resale obligations of FTA § 251(c)(4) do not apply to telecommunications service to an ESP where AT&T Texas offers the telecommunications service as an input component to the ESP who combines the telecommunications service with its own enhanced service. This conclusion is consistent with the FCC’s determination that FTA § 251(c)(4) should apply only to services targeted to end-user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate.³⁸⁰ In the context of determining whether DSL services sold by ILECs to ISPs

³⁷⁴ UTEX Initial Br. at 174.

³⁷⁵ *Id.* at 176.

³⁷⁶ AT&T Texas Ex. 21, Pellerin Direct, at 66:19-20.

³⁷⁷ *Id.* at 66:21-67:2.

³⁷⁸ *Id.* at 67:2-5.

³⁷⁹ *Id.* at 69:11-22.

³⁸⁰ *Advanced Services Resale Order* ¶ 17.

should be subject to the resale obligations of FTA § 251(c)(4), the FCC interpreted the term “at retail” to mean a sale to an ultimate consumer and found that the ISP is not the ultimate end-user.³⁸¹ Consequently, the FCC concluded that while an ILEC DSL offering to residential and business end-users is a retail offering designed and sold to the ultimate end-user and is, therefore, subject to the resale obligations of FTA § 251(c)(4), an ILEC offering of DSL services to ISPs as an input component to the ISP’s high-speed Internet service offering is not a retail offering and is, therefore, not subject to the requirements of FTA § 251(c)(4).³⁸² In light of the FCC’s determinations, the Arbitrators conclude that AT&T Texas’s obligations under FTA § 251(c)(4) do not apply to service to an ESP where AT&T Texas offers the service as an input component to the ESP who combines the service with its own enhanced service. It follows, therefore, that UTEX may not resell service obtained at wholesale rates from AT&T Texas to its ESP customer where such service is used as an input component by the ESP who combines the service with its own enhanced service to offer a retail offering to its own end-use customers. In other words, the Arbitrators conclude that UTEX may resell a telecommunications service it obtains at wholesale rates from AT&T Texas to its ESP customer only if the ESP customer is the ultimate end user of the service and, therefore, uses the service for the ESP’s own administrative purposes (*e.g.*, to place and receive calls). In such a case, the ESP will be the ultimate retail consumer of the service and will not be using the service as an input to a service it provides to its customers.

Unbundled Network Elements

DPL Issue: AT&T UNE-1

Should this Agreement implement the rules and regulations for Unbundled Network Elements in accordance with the FCC’s orders?

UTEX’s Position

UTEX states that its proposed terms were developed and initially submitted in 2005 a few days after the FCC’s *Triennial Review Remand Order (TRRO)* was released but before the FCC

³⁸¹ *Id.* ¶¶ 14 & 17.

³⁸² *Id.* ¶ 19.

rules associated with the *TRRO* were in effect.³⁸³ UTEX asserts that its proposed Unbundled Network Element (UNE) terms were not intended to state or imply that it wants the Commission to “reinstate” any of the prior UNEs that were eliminated in the FCC’s *Triennial Review Order* (*TRO*) and *TRRO* pursuant to FTA § 251(c)(3) or state law.³⁸⁴ UTEX states that although Order No. 30 did not allow its proposed refresh UNE language on the grounds that UTEX had not sufficiently articulated a “change of law” basis to move from its 2005 terms, it did allow UTEX to add the “*TRO/TRRO*” rider and the “Wire Center Declassification” rider that would overrule any of the UTEX 2005 proposals that are inconsistent with the *TRO/TRRO*.³⁸⁵

UTEX states that in developing its proposed UNE terms, it started with the UNE terms in the Alpheus agreement.³⁸⁶ Specifically, UTEX contends that its 2005 UNE terms in the “Raw Material UNEs” attachment were patterned after those being litigated by El Paso Global (now known as Alpheus) in Docket No. 25188, particularly regarding fiber and cross-connects.³⁸⁷ While a Commission order approving the ICA including UNE terms in Docket No. 25188 was issued on August 31, 2004, subject to future revisions as necessary to implement the *TRO* and *TRRO*, the complete ICA between Alpheus and AT&T was filed and then approved on August 25, 2006, and September 7, 2006 respectively – after UTEX had submitted its 2005 language. UTEX claims that despite the characterization of three different types of UNEs (Raw Materials, Enabling, and Business Enhancement) in its proposed language, UTEX’s primary goal was to end up with UNE terms that resembled the ultimate outcome in Docket No. 25188 regarding fiber and cross connects.

In addition, UTEX asserts that its 2005 UNE language includes provisions for loops to a network interface device (NID) on a pole, or subloops to a NID on a pole as well as methods to access smaller volumes of subloops that the Commission required AT&T Texas to provide in Docket No. 28821 for the CLEC Joint Petitioners (CJP), although the wording is slightly different than the language in the CJP ICA.³⁸⁸ UTEX states that its Raw Material UNE terms in

³⁸³ UTEX Ex. 1, Feldman Direct, at 276:10-11.

³⁸⁴ *Id.* at 274:18-20.

³⁸⁵ *Id.* at 276:14-19, 283:13-15.

³⁸⁶ *Id.* at 280:8-10.

³⁸⁷ UTEX Initial Br. at 178-179.

³⁸⁸ UTEX Ex. 1, Feldman Direct, at 280:11-16.

its 2005 petition had provisions relating to “Loop to NID on Pole,” “Subloop to NID on Pole,” and “Small Volume Splice.”³⁸⁹ UTEX states that Raw Material UNE §§ 3.3, 5.5.1, and 6.3 address loop and subloop to NID on pole and Raw Material UNE §§ 5.5.2, 5.5.3, 5.5.4, 5.5.5, 5.5.8, and 6.1 address small volume splice and sub-loop interface device (SID) equivalent.³⁹⁰ UTEX states that these terms came from the Posner Agreement, which in turn was replaced by the terms in the Docket No. 28821 CJP ICA.³⁹¹ UTEX states that the CJP ICA included language regarding “Radio Port” as well as other terms that revised the original terms in the Posner Agreement. UTEX contends that AT&T Texas has no legal basis for opposing approval of the terms on fiber, cross connects, loop to NID on pole, subloop to NID on pole, and small volume splice because these terms were addressed in UTEX’s 2005 petition, and its refresh UNE terms merely used the same words as they currently appear in the Commission-approved ICAs for Alpheus and CJP.³⁹²

UTEX opposes AT&T Texas’s proposed UNE terms, arguing that they do not include many of the fiber-related offerings and related pre-ordering and provisioning requirements that are included in the UNE terms contained in the Alpheus ICA, nor do they include provisions for loops to a NID on a pole, subloops to a NID on a pole, or the methods to access smaller volumes of subloops that are contained in the CJP ICA.³⁹³ UTEX also asserts that AT&T Texas’s UNE terms do not allow for combinations and cross-connects between UNEs and self-provided or alternatively obtained network elements and functionally limit UTEX to combining or cross-connecting solely through collocation.³⁹⁴

UTEX recommends the adoption of the UNE terms in the Alpheus ICA approved in Docket No. 25188 together with the inclusion of terms relating to “Loop to Network Interface Device on Pole,” “Subloop to Network Interface Device on Pole,” and “Small Volume Splice” from the CJP agreement.³⁹⁵

³⁸⁹ UTEX Initial Br. at 179.

³⁹⁰ *Id.* at 179 n.200.

³⁹¹ *Id.* at 179.

³⁹² *Id.* at 179-180.

³⁹³ UTEX Ex. 1, Feldman Direct, at 280:7-8 & 280:11-15.

³⁹⁴ *Id.* at 280:17-281:6.

³⁹⁵ *Id.* at 283:11-13; UTEX Ex. 3, Feldman Rebuttal, at 72:14-17.

AT&T Texas's Position

AT&T Texas states that the parties should incorporate terms and conditions for UNEs in accordance with the law.³⁹⁶ AT&T Texas asserts that in order to help simplify the negotiation and implementation process of the UNE attachment, all of the applicable attachments, terms and conditions for UNEs from the CLEC Coalition ICA approved by the Commission in Docket No. 28821 should be used.³⁹⁷ Attachments that AT&T Texas proposes to include are: UNE Attachments 6, 6 Exhibit A, 6A Attachment A to Amendment: Appendix Wire Center Classification to Attachment 6, Appendix 251(c)(3) Pricing Attachment and Schedule, and Appendix 251(c)(3) Sub-Loop Elements, 7, 8, 18 and 19.³⁹⁸ These attachments would replace all of the attachments proposed by UTEX.³⁹⁹

If AT&T Texas's proposed use of the CLEC Coalition documents is not accepted, AT&T Texas alternatively proposes its UNE Appendix and all associated pricing, together with the TRO and the TRRO attachments, that were approved by the Commission in Docket No. 30459 and the Docket No. 31303 wire center classification attachment.⁴⁰⁰

AT&T Texas objects to the adoption of UNE terms as proposed by UTEX, which it believes come from various sources, arguing that UTEX's proposed language is not explained and was not approved by the Commission.⁴⁰¹ AT&T Texas argues that inclusion of the *TRRO* Rider and a Wire Center Declassification Rider to overrule unlawful UNE terms proposed by UTEX is an inefficient, confusing, and impractical approach to contract construction.⁴⁰²

Arbitrators' Decision

FTA § 251(c)(3) imposes a duty on ILECs to provide access to network elements on an unbundled basis to any requesting telecommunications carrier. The FCC identified the UNEs

³⁹⁶ AT&T Texas Ex. 9, Direct Testimony of Deborah Fuentes Niziolek (Niziolek Direct), at 35:3-4.

³⁹⁷ *Id.* at 36:7-10.

³⁹⁸ *Id.* at 36:10-14.

³⁹⁹ *Id.* at 36:15-16.

⁴⁰⁰ *Id.* at 36:17-20; AT&T Texas Initial Br. at 44.

⁴⁰¹ AT&T Texas Ex. 9, Niziolek Direct, at 37:7-8.

⁴⁰² AT&T Texas Ex. 10, Rebuttal Testimony of Deborah Fuentes Niziolek (Niziolek Rebuttal), at 14:14-15:2.

that ILECs must make available in the *Local Competition Order*.⁴⁰³ These unbundling obligations were substantially modified in the *TRO*⁴⁰⁴ and the *TRRO*.⁴⁰⁵ Those orders, among other things, removed certain network elements from the list of network elements previously classified as UNEs and limited the provision of certain loop and transport UNEs to wire centers where the competitive carriers would be impaired without access to these UNEs. The Commission addressed the changes necessitated by the *TRO* and *TRRO* in the ICAs between AT&T Texas (formerly known as SBC Texas) and CLECs in Docket Nos. 30459 and 31303.

In Order No. 30, the Arbitrators approved updates to the ICA language proposed by the parties in 2005 to reflect changes agreed to by both parties or arising from a change in law since the Second Amended Petition for Arbitration and Response were filed in February and March 2005, respectively.⁴⁰⁶ Among the updates justified by changes of law that were approved by the Arbitrators were conforming UNE language as a result of the FCC's *TRO* and *TRRO* decisions and the Commission's decisions in Docket Nos. 30459 and/or 31303. The conforming UNE language approved by the Arbitrators is contained in the 1) Triennial Review Order/Triennial Review Remand Order Rider,⁴⁰⁷ 2) Wire Center Classification Rider (delineating the process to address future wire center declassification),⁴⁰⁸ 3) Exhibit A-Appendix UNE containing the list of Commingled Arrangements from the Alpheus ICA,⁴⁰⁹ and 4) the Alpheus UNE Combinations Schedule taken from the EPN ICA.⁴¹⁰

Both UTEX and AT&T Texas recommend adoption of UNE terms from ICAs that were approved by the Commission after they filed their proposed UNE terms in 2005. UTEX

⁴⁰³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325 (Aug. 8, 1996) (*Local Competition Order*).

⁴⁰⁴ Report and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 and 98-147, 18 FCC Rcd 16978 (as corrected by the Errata, 18 FCC Rcd 19020, and as modified by Order on Reconsideration) (rel. Aug. 9, 2004) (*TRO*).

⁴⁰⁵ Order on Remand, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290 (rel. Feb. 2005) (*TRRO*).

⁴⁰⁶ Order No. 30 at 3-4 (March 15, 2010).

⁴⁰⁷ Joint Ex. 3, Competing ICA Language, at 317-345.

⁴⁰⁸ *Id.* at 309-315.

⁴⁰⁹ *Id.* at 316.

recommends the adoption of UNE terms from the Alpheus ICA approved in Docket No. 25188, and the adoption of certain UNE terms relating to loops to a NID on a pole, subloops to a NID on a pole, and small volume splice from the Docket No. 28821 CJP ICA. AT&T Texas, on the other hand, recommends the adoption of certain UNE attachments from the Docket No. 28821 CLEC Coalition ICA as its first alternative.

The Arbitrators find that the ICA should contain terms and conditions for UNEs that UTEX seeks, provided such terms and conditions are in accordance with FCC orders, including the *TRO* and *TRRO*. The Arbitrators note that several provisions in the UTEX proposed contract language relating to loop, subloop, dedicated transport, and dark fiber UNE terms appear to be patterned after those same terms in the Appendix UNE in the Alpheus ICA approved in Docket No. 25188, although the three categories of UNEs (Raw Materials, Enabling, and Business Enhancement) proposed by UTEX in its 2005 contract language do not appear in the Alpheus ICA.

The Arbitrators conclude that it is appropriate to adopt the UNE appendix in the Alpheus ICA approved in Docket No. 25188. In addition, the Arbitrators adopt the following UNE-related attachments allowed by Order 30: 1) the Triennial Review Order/Triennial Review Remand Order Rider, 2) Wire Center Classification Rider, 3) Exhibit A-Appendix UNE containing the list of Commingled Arrangements from the Alpheus ICA and 4) the Alpheus UNE Combinations Schedule taken from the EPN Agreement. The Arbitrators note that although the UNE Appendix in the Alpheus ICA approved in Docket No. 25188 by itself would not be TRO/TRRO compliant, the UNE terms in that appendix are compliant with the law and the FCC orders, including the TRO/TRRO, when read together with the riders and attachments allowed by Order No. 30. The UNE appendix in the Alpheus ICA has been approved by the Commission and provides the UNE terms sought by UTEX. Furthermore, AT&T Texas has not claimed that the UNE Appendix in the Alpheus ICA when read together with the riders and attachments allowed by Order No. 30 are unlawful or unreasonable.

The Arbitrators reject AT&T Texas's argument that the inclusion of riders that are intended to overrule unlawful UNE terms is an inefficient, confusing, and impractical approach to contract construction. The Arbitrators note that AT&T Texas used this approach to ensure that the UNE terms in the Alpheus ICA in Docket No. 25188 complied with the law, and AT&T Texas has not

⁴¹⁰ *Id.* at 366-368.

identified any disputes that have resulted from the interpretation of that ICA. Furthermore, AT&T Texas and UTEX are not precluded from integrating the riders and attachments into the UNE appendix from the Alpheus ICA if they can mutually agree on ICA language accomplishing that task.

The inclusion of UNE terms from the CJP ICA relating to loop and subloop to a NID on a pole and small volume splice are addressed under DPL issue AT&T UNE-19. Issues related to the pricing schedule for UNEs are addressed under the DPL issues AT&T PR-1 and AT&T PR-2. Furthermore, the Arbitrators address contract language in connection with specific UNE issues under DPL issues AT&T UNE-2 through AT&T UNE-25 and UTEX UNE 1.

Signaling

DPL Issues: UTEX 28 and 29, AT&T NIM 3(b)-(c)

Is signaling part of the duties imposed on LECs under 251(b)(5) and/or § 251(c)(2) and if not how does the Act intend to fairly allow for a competitive provider to interconnect its network to the PSTN for the mutual exchange of traffic?

Can AT&T require UTEX to directly or indirectly purchase signaling services at non-cost based rates in order to compete against AT&T?

UTEX's Position

UTEX states that AT&T Texas should be required to interconnect its signaling network elements with UTEX's signaling network elements (SS-7 based Signaling Transfer Points (STPs) connected through B-Links) and that both parties should exchange necessary signaling.⁴¹¹ In order for any call to be successfully established and then disconnected, there must be some form of signaling. UTEX states that signaling interconnection is clearly part of the duties imposed on LECs and particularly ILECs under FTA §§ 251(b)(5) and 251(c)(2). It is an absolute prerequisite for the "transport and termination of telecommunications" and is clearly part of "the transmission and routing of telephone exchange service and exchange access." UTEX states that FCC Rule 51.305(a)(2)(v) expressly and unequivocally requires AT&T Texas to interconnect its signaling elements with UTEX's. Furthermore, Subpart F of the FCC's rules

⁴¹¹ See Tr. at 391:24 (Apr. 15, 2010).

expressly and unequivocally prohibits recourse to access tariffs to accomplish the interconnection;⁴¹² any terms must be cost-based.⁴¹³ UTEX states that the Commission must require AT&T Texas to interconnect its signaling elements with UTEX's signaling elements, and must refuse AT&T Texas's demand that UTEX buy signaling out of AT&T Texas's access tariff at rates that are not cost-based and are prohibitive to market entry.⁴¹⁴

UTEX also requests the ability to manually order "Interconnection" with SS7 signaling, as AT&T Texas has acknowledged that AT&T Texas has no systems in place to allow for the ordering and provisioning of such interconnection. AT&T Texas only has its tariff. Finally, UTEX states that it has requested standard liquidated damages language to be included upon AT&T Texas's refusal to interconnect. UTEX is concerned about intentional breach by AT&T Texas to continue to block UTEX's rights.

AT&T Texas's Position

AT&T Texas states that UTEX is not entitled to purchase SS7 signaling from AT&T Texas at (cost-based) TELRIC (total element long-run incremental cost) rates because those rates are only applicable to UNEs. The FCC found in the FCC's *TRO* that CLECs were not impaired without access to an ILEC's signaling network, because those services could be obtained from a competitive provider. After SS7 signaling was declassified as a UNE, SS7 signaling can only be purchased from AT&T Texas through its tariff.⁴¹⁵

AT&T Texas states that UTEX seeks to purchase signaling at UNE rates as interconnection, but SS7 signaling is not a form of interconnection. The FCC has stated that interconnection under FTA § 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.⁴¹⁶ In Docket No. 28821, the Commission approved the following language:

⁴¹² While the Subpart refers to "pricing of elements" it also explicitly applies to interconnection. *See* 47 C.F.R. § 51.501.

⁴¹³ UTEX Initial Br. at 54.

⁴¹⁴ *Id.* at 55.

⁴¹⁵ AT&T Texas Ex. 15, McPhee Direct, at 101:10-24.

⁴¹⁶ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185; FCC 96-325 – First Report and Order ¶ 26 (Aug. 8, 1996) ("Local Competition Order").

Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to: (1) physical collocation and virtual collocation at the premises of an incumbent LEC; and (2) *fiber meet interconnection arrangements*.⁴¹⁷ (Emphasis added.)

Carriers interconnect through facilities that contain the trunks on which the calls themselves “ride.” SS7 signaling is not part of those facilities; rather, it is an “out-of-band” system that signals where the calls should be routed.⁴¹⁸ People talk over the trunk circuit, not an SS7 link.⁴¹⁹ Therefore, according to AT&T Texas, UTEX’s proposed contract language for “SS7 interconnection” is inappropriate.⁴²⁰

AT&T Texas proposes language to interconnect UTEX’s network – including SS7 signaling – with that of AT&T Texas. According to AT&T Texas, that is all the law requires. If UTEX needs SS7 signaling, it must purchase it from AT&T Texas or some other vendor. The arbitrators should reject UTEX’s attempt to circumvent the FCC’s declassification of SS7 signaling.⁴²¹

AT&T Texas notes that, in Docket No. 33323, the Commission found that UTEX was not entitled to B-Links because it had no STP and thus lacked “peer” status with AT&T Texas.⁴²² UTEX has since stated that it does have an STP.⁴²³ Mr. Feldman re-affirmed this position at the hearing.⁴²⁴ According to AT&T Texas, UTEX’s sworn bankruptcy filings list the company’s assets but do not include an STP.⁴²⁵ The assets listed, located in three cities, total approximately \$45,000, with no single city having more than \$21,000 in equipment, despite UTEX’s claim that

⁴¹⁷ Docket No. 28821, Network Architecture/Interconnection-Jt. DPL-Final, SBC Issue No. 10 at 9 (Feb. 23, 2005).

⁴¹⁸ AT&T Texas Ex. 11, Hamiter Direct, at 8:8 –20:8.

⁴¹⁹ AT&T Texas Ex. 19, Neinast Direct, at 25:13.

⁴²⁰ AT&T Texas Initial Br. at 27.

⁴²¹ *Id.*

⁴²² Docket No. 33323, Arbitration Award at 23.

⁴²³ Feldman Direct at 267:9 (“AT&T insists that if UTEX wants to have its STP’s connect to AT&T’s STPs”); 268:21-23 (“UTEX DOES have its own STP capability and we are standing by, ready to interconnect our signaling network with AT&T’s signaling network”).

⁴²⁴ Tr. at 384:5-7 (Apr. 14, 2010).

⁴²⁵ AT&T Texas Ex. 30 at 14.

it, unlike AT&T Texas, has invested considerably in equipment to serve many carriers and customers.⁴²⁶

AT&T Texas states that the bankruptcy schedules are consistent with AT&T Texas witness Mr. Boyd's testimony that UTEX's current STP capability exists through an A-Link with TNS (Transaction Network Services), which owns an STP and buys a B-Link from AT&T Texas out of the latter's tariff.⁴²⁷ TNS is listed in the bankruptcy schedule as both a creditor and a party to an executory contract with UTEX. That contract consists of "Various SS7, ISUP, LNP and A-Link MSA and service order agreements."⁴²⁸ This type of arrangement, in which TNS invests in an STP and purchased a B-Link that it makes available to many CLECs—including UTEX—is precisely what should occur in a competitive market.⁴²⁹

AT&T Texas stated that, in Docket No. 33323, the Commission also held that UTEX was not entitled to interconnection using B-Links because the FCC has concluded that interconnection does not occur through B-Links, rather through STP to STP interconnection:

As the FCC has indicated, interconnection occurs at an STP-to-STP connection, not at an SS7 B-Link. Therefore, UTEX's argument that AT&T Texas should interconnect through SS7 B-Links conflicts with the FCC's Local Competition Order. Accordingly, the Arbitrator finds that UTEX is not entitled to an SS7 B-Link interconnection with AT&T Texas.⁴³⁰

Even if UTEX had an STP, which it plainly does not, UTEX would be required to purchase the B-Link through AT&T Texas's tariff in the same way that TNS currently purchases it.

Arbitrators' Decision

The FCC's interconnection rules state that an ILEC must allow a requesting carrier to interconnect with the ILEC's "[o]ut-of-band signaling transfer points necessary to exchange

⁴²⁶ Tr. at 441:8-9 (Apr. 14, 2010). The price of a newly installed STP for AT&T Texas is well over \$1 million.

⁴²⁷ Tr. at 322:24 –323:23 (Apr. 14, 2010).

⁴²⁸ See AT&T Texas Ex. 30 at 22 (listing TNS as a creditor with a \$21,124.62 claim) & 25 (listing TNS as a party with whom UTEX has an executory contract or unexpired lease).

⁴²⁹ AT&T Texas Initial Br. at 30.

⁴³⁰ Docket No. 33323, Arbitration Award at 26.

traffic at these points and access call-related databases.”⁴³¹ And the FCC’s TELRIC pricing rules apply to interconnection.⁴³² The Arbitrators conclude, therefore, that UTEX may purchase and have access to AT&T Texas’s STP (which is one of the “out-of-band signaling transfer points” to which the FCC refers above) at TELRIC rates to interconnect UTEX’s own STP. AT&T Texas states that the FCC has declassified signaling as a UNE. This simply means that, to the extent UTEX seeks access to AT&T Texas B-links, UTEX may not purchase those network elements at TELRIC prices. Thus, the FCC’s interconnection rules apply, and the declassification of signaling as a UNE is not relevant except with regard to B-Links.

Technically Feasible Forms of Interconnection

AT&T Texas Internal Communications

DPL Issue: AT&T NIM – 2-7(c)

Are physical technologies used for internal communications appropriate methods of interconnection?

UTEX’s Position

UTEX states that internal communications (for example, if AT&T uses session initiation protocol (SIP) for internal communications or as part of a service to its own customers) fits the FCC’s definition of “technically feasible” in FCC Rule 51.5⁴³³ and the requirements of FCC

⁴³¹ 47 C.F.R. § 51.305(a)(2)(v).

⁴³² 47 C.F.R. § 51.501(a) (“The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements”).

⁴³³ *Technically feasible.* Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. *A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.* (Emphasis added by UTEX.)

Rule 51.305(a)(3).⁴³⁴ UTEX states that if there is SIP within AT&T Texas network – now or later - then SIP becomes a mandatory method and form of interconnection under FCC rules and the Act.⁴³⁵

UTEX states that AT&T Texas uses asynchronous transfer mode (ATM) in its own network to support its various services; that this constitutes providing ATM “to itself;” and that ATM fits within the FCC’s definition of “technically feasible” in FCC Rule 51.5 and the requirements of FCC Rule 51.305(a)(3) and (a)(4); thus ATM is a mandatory method and form of interconnection under FCC rules and the Act.⁴³⁶

AT&T Texas’s Position

AT&T Texas’s position is that physical technologies used for internal communications are not appropriate methods of interconnection. AT&T Texas states that technologies used for internal communications are often not technically feasible methods of interconnection, and that

⁴³⁴ **§51.305 Interconnection.**

(a) An incumbent LEC shall provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC’s network:

- (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;
- (2) At any technically feasible point within the incumbent LEC’s network including, at a minimum:
 - (i) The line-side of a local switch;
 - (ii) The trunk-side of a local switch;
 - (iii) The trunk interconnection points for a tandem switch;
 - (iv) Central office cross-connect points;
 - (v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and
 - (vi) The points of access to unbundled network elements as described in § 51.319;
- (3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC’s network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier;
- (4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission’s rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

⁴³⁵ Joint Ex. 1, Joint DPL, at AT&T NIM-2(a).

⁴³⁶ *Id.* at AT&T NIM 4-1.

UTEX's proposed language would allow UTEX to utilize any physical medium for interconnection even if it is not technically feasible, which would violate the FTA.⁴³⁷

Arbitrators' Decision

The Arbitrators find that a determination of whether a method of interconnection is "appropriate," as asserted by AT&T Texas, has no bearing on whether an interconnector should be able to use such a method. Rather, the term "technically feasible," as defined by the FCC in the context of interconnection methods, is the correct basis for such determinations. FCC Rule 51.305(a)(2) stipulates that it is the duty of the ILEC to interconnect "at any technically feasible point within the carrier's network." The FCC has further stated:

Several parties also attempt to draw a distinction between what is "feasible" under the terms of the statute, and what is "possible." The words "feasible" and "possible," however, are used synonymously. Feasible is defined as "capable of being accomplished or brought about; possible." The statute itself provides a more meaningful distinction. Unlike the "technically feasible" terminology included in sections 251(c)(2) and 251(c)(3), section 251(c)(6) uses the term "practical for technical reasons" in determining the scope of an incumbent LEC's obligation to provide for physical collocation. "Practical" is defined as "manifested in practice or action . . . not theoretical or ideal" or "adapted or designed for actual use; useful," and connotes similarity to ordinary usage. Thus, it is reasonable to interpret Congress's use of the term "feasible" in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely "practical" or similar to what is ordinarily done. That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated. For example, Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant. Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.⁴³⁸

⁴³⁷ *Id.* at AT&T NIM-2(a).

⁴³⁸ *First Report and Order*, Docket No. 96-98, ¶ 202 (citations omitted).

In light of the foregoing, the Arbitrators conclude that neither the term “internal network” nor the fact that a given technology may not previously have been used for interconnection to the ILEC’s network has any bearing on the determination of the technical feasibility of an interconnection method. Further, the FCC’s definition of technical feasibility expressly proscribes economic concerns in the determination of feasibility.⁴³⁹ Therefore, the Arbitrators decline to adopt UTEX’s proposed NIM § 1.4.5.

Interconnection with AT&T Texas Affiliates

DPL Issues: AT&T NIM – 1-3(b), AT&T NIM 4-1, 6-2(b), AT&T NIM 5-1, 6-2(c)

Should AT&T’s Non-Telco affiliates be required to enter into §§251/252 interconnections arrangements?

Does § 251(c)(2) require AT&T’s non-ILEC affiliates to interconnect with UTEX via what UTEX calls “ATM Interconnection”?

Does § 251(c)(2) require AT&T’s non-ILEC affiliates to interconnect with UTEX under this Agreement via SIP interconnection?

UTEX’s Position

UTEX states that it does not seek to require AT&T Texas’s non-telco affiliates to enter into ICAs.

AT&T Texas’s Position

AT&T Texas states that §§ 251/252 interconnection is an obligation of the telephone service provider (presumably, the ILEC), not non-telco affiliates.⁴⁴⁰ It further states that neither ATM nor SIP are used in the provision of telephone exchange or exchange access services.⁴⁴¹

Arbitrators’ Decision

UTEX states that it does not seek to require AT&T Texas’s affiliates to enter into ICAs. The Arbitrators, therefore, find that these issues are moot.

⁴³⁹ 47 C.F.R. § 51.5 (definition of technical feasibility); *First Report and Order*, Docket No. 96-98, ¶¶ 198-200.

⁴⁴⁰ Joint Ex. 1, Joint DPL, at AT&T NIM 1-3(b).

Interconnection Protocols

DPL Issues: NIM 2-1(c), 2-6(c), 2-7(a), UTEX 23 and 27; AT&T NIM 3(a), UTEX 24-26; AT&T NIM 2-7(b), 6-2(a); AT&T NIM 3-1; AT&T NIM 2-7(d); AT&T NIM 2-7(e); AT&T NIM 6-2(d)

Is SS7 a valid form of Interconnection?

Are ISDN, ATM, SS7 and SIP valid forms of Section 251(c)(2) interconnection?

Is ISDN PRI a valid form of Interconnection?

Is it appropriate for UTEX to utilize ISDN, an AT&T retail switching “service,” to interconnect its network to AT&T under §251(c)(2)?

Is ISDN PRI a technically feasible form of interconnection?

Is ATM a Technically Feasible Method of Interconnection?

Are channelized DS3, OC3, or OC12 valid methods of Interconnection?

Are Ethernet, DSL and Gig E appropriate methods of interconnection?

UTEX’s Position

UTEX states that signaling is simply a sub-part of “interconnection.” Without signaling, traffic cannot pass. UTEX argues that AT&T Texas has an obvious preference for signaling by SS-7, citing as an example AT&T Texas’s opposition to the use of SIP. UTEX asserts that AT&T Texas is essentially playing a word game with the Act by pretending that a call can be exchanged without signaling, and then requiring anti-competitive terms for “signaling” outside of the requirements of the Act. UTEX contends that this is unlawful and anticompetitive, and that signaling is a requirement, both legally and technically, for interconnection. UTEX states that when two LECs compete, their networks are to interconnect with mutual cost recovery being reciprocal; AT&T Texas’s proposal requires asymmetric treatment.⁴⁴²

⁴⁴¹ *Id.* at AT&T NIM 4-1, 5-1.

⁴⁴² Joint Ex. 1, Joint DPL, at NIM 2-1(c).

UTEX proposes language that would require AT&T Texas to interconnect using SIP if and when AT&T Texas ever deploys this technology for internal use or as a service. UTEX states that AT&T Texas has indicated it does not at present have this capability. UTEX's terms would not require AT&T Texas to acquire this capability now. But UTEX maintains that if and when AT&T Texas adds SIP to its network, then the law requires AT&T Texas to interconnect using it, and the terms should be in the ICA, rather than forcing UTEX to seek an amendment after it discovers AT&T Texas does in fact have the capability. UTEX notes that AT&T Texas has provided no evidence disputing the reasonableness of UTEX's proposed language for SIP.⁴⁴³

UTEX asserts that AT&T Texas does have ATM in its network and uses it to support the transmission component of its various telephone exchange and exchange access services.⁴⁴⁴ In other words, AT&T Texas provides ATM "to itself." Notwithstanding that AT&T Texas may not offer ATM as a "service," the FCC rules require interconnection if and to the extent an ILEC provides a functionality to itself as part of a discrete service. *See* FCC Rule 51.305(a)(3) and (4). AT&T Texas has provided no evidence disputing the reasonableness of UTEX's Proposed Language for ATM.⁴⁴⁵

UTEX states that its 2005 language also proposed terms relating to ISDN interconnection, but as was indicated at the hearing, UTEX has functionally given up on that issue, stating that it is apparent AT&T Texas will never actually comply and the Commission has chosen not to truly enforce the current terms relating to this form of interconnection. But UTEX states that the Commission specifically rejected AT&T Texas's argument that ISDN is a retail service and an inappropriate method to interconnect in the Waller Creek arbitration, and that the Fifth Circuit affirmed that conclusion. UTEX opines that AT&T Texas has a heavy burden to prove that the Commission's decision was incorrect, if it is legally allowed even to try, which UTEX denies.

UTEX states that Docket Nos. 29944 and 33323 interpreted the current ISDN terms, and that UTEX made changes to address the problematic terms that were applied and interpreted in Docket 29944.⁴⁴⁶

⁴⁴³ UTEX Initial Br. at 214-215.

⁴⁴⁴ AT&T Texas Ex. 19, Neinast Direct, at 31:8-14.

⁴⁴⁵ UTEX Initial Br. at 216.

⁴⁴⁶ *Id.* at 216-217.

UTEX contends that AT&T Texas has the burden of proving that SIP and ATM interconnection is not technically feasible as defined in FCC Rule 51.5 and applied in FCC Rule 51.305(e).⁴⁴⁷

AT&T Texas's Position

AT&T Texas states that SS7, ISDN, SIP, and ATM are not forms of interconnection at all but are, instead, methods of signaling. AT&T Texas states that it does not use IP signaling in its network, and therefore UTEX must signal with SS7.⁴⁴⁸ AT&T Texas opines that it should not be required to utilize ISDN, an AT&T Texas retail switching service, for interconnection purposes, but that if the Commission determines that ISDN interconnection should be allowed, UTEX should be required to adhere to all restrictions and requirements outlined in Docket Nos. 29944 and 33323.⁴⁴⁹

Arbitrators' Decision

The Arbitrators find AT&T Texas's argument that SS7, ISDN, SIP, and ATM are forms of signaling and thus not forms of interconnection to be erroneous. Signaling is part of the ILEC's responsibilities under FTA § 251(c)(2), which defines interconnection as an obligation of the ILEC to interconnect "[f]or the transmission and *routing* of telephone exchange service and exchange access." (Emphasis added.) Furthermore, the FCC's interconnection rules state that an ILEC must allow a requesting carrier to interconnect with the ILEC's "[o]ut-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases."⁴⁵⁰ Finally, the Commission decided in Docket No. 33323 that ISDN is a technically feasible form of interconnection if the CLEC switch to which it is terminated is capable of meeting all the requirements of interconnection. The Arbitrators adopt the terms for ISDN interconnection consistent with the Commission's decision in Docket No. 33323.⁴⁵¹

⁴⁴⁷ UTEX Ex. 1, Feldman Direct, at 269:10-11.

⁴⁴⁸ AT&T Texas Ex. 20, Neinast Rebuttal, at 17:7-10.

⁴⁴⁹ Joint Ex. 1, Joint DPL, at NIM 3-1.

⁴⁵⁰ 47 C.F.R. § 51.305(a)(2)(v).

⁴⁵¹ See Award in Docket 33323 at 25.

AT&T Texas bears the burden of proving that ATM, SIP, SS7 DS3, OC3, OC12, Ethernet, Gig E, and DSL are not technically feasible methods of interconnection,⁴⁵² and it has not met this burden of proof.

The Arbitrators decline to adopt UTEX's proposed §§ 1.4-1.4.4, because UTEX terms this list of methods of physical interconnection to be "acceptable." That an interconnection method is acceptable does not show it to be technically feasible; as discussed above, the test against which a proposed method of interconnection must be weighed is technical feasibility. The Arbitrators adopt UTEX's proposed § 1.4.5, as modified below, because UTEX may request any technically feasible interconnection method, as it has proposed to do in §§ 1.6.4 and 1.6.5 regarding ATM and SIP interconnection. The Arbitrators therefore adopt UTEX's proposed §§ 1.6.4 and 1.6.5.

Consistent with the foregoing, the Arbitrators adopt UTEX's proposed §§ 1.5-1.5.3 with modifications to § 1.5 (reflecting ISDN's technical feasibility as discussed above) as follows, but decline to adopt §§ 1.5.4-1.5.5, as the technical feasibility for ATM and SIP have yet to be determined.

1.4.5 Appendix 1 to NIM details the physical methods of interconnection currently available to UTEX. UTEX may request and AT&T TEXAS shall provide any additional **technically feasible** physical method of Interconnection ~~if physical interconnection is also a physical technology used for internal communications, or for the provision in whole or in part of a wholesale or retail service including services provided to carriers, wholesale customers, end users or affiliates or subsidiaries of AT&T TEXAS.~~

1.5 To date, three ~~five two~~ technically feasible standard signaling protocols have been developed, **any either** of which may be used **in when** interconnecting networks for the mutual exchange of traffic.; They ~~they~~ are:

1.5.1 MF Signaling

1.5.2 SS-7 Signaling

1.5.3 ISDN Signaling

~~1.5.4 ATM Signaling~~

~~1.5.5 SIP Signaling~~

⁴⁵² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC 96-98, First Report and Order ¶ 194, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996).

The Arbitrators decline to adopt UTEX's proposed § 1.6, because its meaning is unclear and UTEX has not offered adequate argument in its support.

The Arbitrators adopt UTEX's proposed § 1.6.1 because it is reasonable.

The Arbitrators decline to adopt UTEX's proposed §§ 1.6.2-1.6.3, because UTEX has not offered argument in support commensurate with the detailed nature of these appendices, these have not been shown to be necessary in other ICAs, and in the case of SS7, UTEX is already interconnected using that technology.

Collocation

Collocation Terms

DPL Issue: AT&T Collo-1 and AT&T NIM 1-4

What terms and conditions provide the clarity required to order physical and virtual Collocation in accordance with FCC orders?

UTEX's Position

UTEX proposes to use the Texas Collocation Tariff and Commission approved pricing, along with terms related to common cageless collocation of remote switch modules (RSMs) and Ethernet equipment that are in its current ICA with AT&T Texas.⁴⁵³

UTEX notes that AT&T Texas's having offered to use the Texas Collocation Tariff (by virtue of offering to include Sections 1.0 and 2.0 from the CLEC Coalition ICA approved in Docket No. 28821) has significantly decreased the areas of dispute regarding collocation⁴⁵⁴ but states that Section 4.0 (relating to an initial period in which AT&T Texas will meter the power consumed by collocated UTEX equipment) should be included as well.⁴⁵⁵

Regarding AT&T Texas's objection to UTEX's proposal to maintain the current terms regarding common cageless collocation for RSMs and Ethernet equipment, UTEX argues that AT&T Texas's objection is simply unfounded. CLECs can indeed collocate this kind of equipment under the FCC rules, so long as it is used for interconnection or access to UNEs.

⁴⁵³ UTEX Initial Br. at 204.

⁴⁵⁴ *Id.*

⁴⁵⁵ UTEX Ex. 3, Feldman Rebuttal, at 74:3-10.

AT&T Texas has quite simply not provided any justification for eliminating these terms, which were approved in *Waller Creek* and affirmed by the Fifth Circuit.⁴⁵⁶

AT&T Texas's Position

AT&T Texas states that UTEX's proposed terms, titled Appendix 1 to Attachment 4, Collocation of Fiber Based Remote Switch Modules and Ethernet Equipment, discuss only RSMs and Ethernet equipment, and thus are not adequate for collocation. AT&T Texas offers Sections 1.0 and 2.0 of the CLEC Coalition Collocation Attachment (from the state Tariff) to replace all proposed UTEX collocation language. AT&T Texas states that the section relating to D.C. power metering should not be included because it was offered only on an interim basis.⁴⁵⁷

Arbitrators' Decision

Consistent with the Commission's decision in Docket No. 28821, and given the parties' agreement, the Arbitrators adopt AT&T Texas's proposed use of Sections 1.0 and 2.0 from the CLEC Coalition ICA approved in Docket 28821. Further, the Arbitrators do not find persuasive AT&T Texas's argument that Section 4.0 (relating to initial metering of D.C. power for collocated equipment) should not be included as it pertains only to an initial interim period. The Arbitrators find that the Section 4.0 provision is reasonable in that it provides for the parties to devise a metering arrangement for the equitable billing of D.C. power and was approved in Docket No. 28821; accordingly, they adopt the CLEC Coalition Appendix Collocation.

Equipment Allowed for Collocation

DPL Issue: AT&T Collo-2

Is AT&T Texas required to provide Collocation for equipment that is not utilized for Interconnection or access to Unbundled Network Elements and what are the appropriate safety standards?

UTEX's Position

UTEX proposes to continue to have terms addressing the option of having remote switch modules (RSMs) and Ethernet equipment in its collocation, stating that these terms are in its

⁴⁵⁶ *Id.*

current ICA.⁴⁵⁸ UTEX states that the Commission found them necessary, appropriate, reasonable, and consistent with the Act in the Waller Creek case, and that this decision was affirmed by the Fifth Circuit.⁴⁵⁹ UTEX states that AT&T Texas's witnesses that claim RSMs are not permissible for collocation – and even that the FCC has not expressly allowed RSMs in collocation⁴⁶⁰ – are simply wrong.⁴⁶¹ The FCC has expressly allowed RSMs, as has this Commission. RSMs and Ethernet equipment fall within the type of “multifunctional” equipment that the FCC rules expressly allow and require.⁴⁶² UTEX states that if something is useful for access to UNEs or for interconnection, then AT&T Texas must allow it to be placed in collocation. Mr. Feldman testified that this equipment would be used for access to UNEs.⁴⁶³

UTEX declares that AT&T Texas has not shown why the separate and additional terms related to virtual common cageless collocation are not reasonable or would be contrary to the Act or FCC rules, and that the Texas Tariffs specifically mention collocated RSMs.⁴⁶⁴ With regard to Ethernet equipment, the current Texas tariffs do not expressly provide for placing this kind of equipment in virtual common cageless collocation.

UTEX states that if AT&T Texas would clarify that the Texas tariffs would allow UTEX to place Ethernet equipment in common cageless collocation, and that no additional prices or forms or processes must be developed to implement such an arrangement, this issue would be moot.⁴⁶⁵

⁴⁵⁷ AT&T Texas Ex. 9, Niziolek Direct, at 12:19-13:17.

⁴⁵⁸ See *Joint Application of Southwestern Bell Telephone Company and UTEX Communications Corp. for Approval of Interconnection Agreement Under PURA 1995 and the Telecommunications Act of 1996*, Docket No. 25349, Interchange Item 1, TIF copy pages 600-637 (August 23, 2000).

⁴⁵⁹ *Southwestern Bell Telephone. Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812 (5th Cir., 2000).

⁴⁶⁰ AT&T Texas Ex. 9, Niziolek Direct, at 13 (“The FCC has never determined that either RSM or Ethernet are requirements for collocation; nor has the FCC ever included the deployment of RSM or Ethernet by an ILEC as constituting collocation.”)

⁴⁶¹ See Fourth Report and Order, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 01-204, 2020 15-54, 16 FCC Rcd 15435, 15443-15465 (rel. Aug. 2001).

⁴⁶² 47 C.F.R. § 51.323(b)(1)-(3).

⁴⁶³ UTEX Ex. 1, Feldman Direct, at 287:18.

⁴⁶⁴ See *Southwestern Bell Telephone Company's Physical and Virtual Collocation Tariffs*, Docket 21333, Interchange Item 204 (Sept. 28, 2001) at Physical Collocation Tariff §§ 9.1, 15.1; Virtual Collocation Tariff § 26.1.1. According to UTEX, the physical collocation tariff also addresses cageless collocation in § 20.3, but there is no provision for Virtual Common Cageless.

⁴⁶⁵ UTEX Initial Br. at 205.

AT&T Texas's Position

AT&T Texas states that it is not required to install equipment that is not necessary for interconnection or has a known history of safety problems, and that UTEX's proposal does not meet safety requirements as set forth in the Network Equipment Building System (NEBS) or Telcordia documentation. AT&T Texas claims that it should also be permitted to enforce safety standards, which serve to protect AT&T Texas's facilities.

AT&T Texas maintains that it is not and should not be required to deploy on behalf of UTEX or any other CLEC any equipment that is not necessary for the transmission and routing of telephone exchange service or exchange access.⁴⁶⁶

Arbitrators' Decision

The current ICA between UTEX and AT&T Texas has terms that address the option of UTEX having remote RSMs and Ethernet equipment in its collocation, and AT&T Texas has not shown why inclusion of such terms in the ICA being established in this docket is inappropriate. Accordingly, the Arbitrators adopt § 1.1 of UTEX's proposed Appendix 1 to Attachment 4, Collocation of Fiber Based Remote Switch Modules and Ethernet Equipment. The Arbitrators find that AT&T Texas has not shown that RSMs or Ethernet equipment pose safety concerns, and any issues AT&T Texas might have about installing equipment that might not meet the safety requirements for a central office should be evaluated in relation to specific equipment involved.

Collocation Applications Process***DPL Issue: AT&T Collo-3***

Should AT&T Texas be required to maintain multiple processes for Collocation Application requests?

UTEX's Position

UTEX states that it wants to be able to establish new collocations without additional paperwork or forms or prices.⁴⁶⁷

⁴⁶⁶ Joint Ex. 1, Joint DPL, at AT&T Collo-1.

⁴⁶⁷ UTEX Initial Br. at 205.

AT&T Texas's Position

AT&T Texas states that, with input from the CLEC community, AT&T Texas developed a Collocation Application and has made that application available via the web portal for use when transmitting a Collocation Application. AT&T Texas claims that the process provides for individualized CLEC requests utilizing a standard process to ensure equal and timely treatment of all CLECs.⁴⁶⁸

Arbitrator's Decision

The Arbitrators find that the Collocation Application established among AT&T Texas and the CLECs is the appropriate means by which UTEX should apply for collocation installations, because it is reasonable and provides for nondiscriminatory treatment of CLECs.

Remote Switch Modules***AT&T Collo-4***

Should AT&T Texas be required to deploy Remote Switch Modules within an AT&T Texas central office under non-specific circumstances?

UTEX's Position

See UTEX position on Issue AT&T Collocation-2.

AT&T Texas's Position

AT&T Texas states that clear, specific language is needed for all products in order to: a) minimize future disputes between the Parties; b) insure network safety and reliability; and c) maintain processes that are effective. AT&T Texas asserts that its proposed language meets these standards.⁴⁶⁹

Arbitrators' Decision

The Arbitrators decline to adopt AT&T Texas's proposed language. Consistent with the Arbitrators' decision on Issue AT&T Collocation-2, the Arbitrators find that, to the extent that

⁴⁶⁸ Joint Ex. 1, Joint DPL, at AT&T Collo-3.

⁴⁶⁹ Joint Ex. 1, Joint DPL, at AT&T Collo-4.

RSMs and Ethernet equipment are used to connect to AT&T Texas network elements and comply with industry NEBS (Network Equipment Building System) and Telecordia standards, no further specificity of circumstances is necessary.

Collocation Pricing Terms

AT&T Collo-5

Should AT&T Texas be required to accept UTEX's proposed pricing for a Collocation Arrangement?

UTEX's Position

UTEX states that if AT&T Texas would clarify that the Texas tariffs would allow UTEX to place Ethernet equipment in common cageless collocation under the Tariffs, and that no additional prices or forms or processes must be developed to implement a collocation arrangement, the collocation issue would be resolved. Unless and until AT&T Texas does so, UTEX continues to seek the separate and additional terms and they must be approved.⁴⁷⁰

AT&T Texas's Position

AT&T Texas states that it offers a pricing schedule that includes collocation, which applies to all CLECs in Texas. These rates have been reviewed and accepted by this Commission in the context of Docket Nos. 28600 and 28821. Moreover, through the negotiation process, many CLECs have adopted these rates in their ICAs. AT&T Texas maintains that there is no basis to revisit these approved rates.⁴⁷¹

Arbitrators' Decision

The Arbitrators find §§ 1.0-2.0 from the CLEC Coalition Collocation Attachment, approved in Docket 28821, which stipulates the Texas Collocation Tariff terms and rate will apply to this ICA, should apply because the Commission has found these terms and rate to be reasonable and the parties both support this result.

⁴⁷⁰ UTEX Initial Br. at 205.

⁴⁷¹ AT&T Texas Ex. 9, Niziolek Direct, at 16:2-6.

Third Party Installers***AT&T Collo-6***

Should AT&T Texas be required to manually provide UTEX with a list of acceptable third party installers or may AT&T Texas provide this information to UTEX online in the same manner as it provides it to all other CLECs?

UTEX's Position

UTEX does not offer an argument addressing this issue.

AT&T Texas's Position

AT&T Texas states that it appears from this issue that UTEX wants AT&T Texas to manually provide UTEX with a list of AT&T Texas third party installers as opposed to accessing this information online through the current process. In its position statement for this issue, UTEX simply points to its Position Statement for Collocation Issue 1. It is unclear what UTEX is specifically requesting because that particular position statement is silent regarding how to obtain a list of AT&T Texas-approved installers.⁴⁷²

Arbitrators' Decision

The Arbitrators conclude that, consistent with AT&T Texas's position, the list of installers is available online and additional mechanisms for providing the information to UTEX are not needed. The Arbitrators find that UTEX has not provided any argument for its proposed language. Therefore, the Arbitrators decline to adopt UTEX's proposed language.

Non-Coterminous Appendix***AT&T Collo-7***

Can AT&T Texas be forced to enter into an ICA appendix that does not expire and therefore perpetuates indefinitely and is not connected to an underlying ICA?

UTEX's Position

UTEX does not offer an argument in support of its proposed language.

⁴⁷² *Id.* at 16:15-17:2.

AT&T Texas's Position

AT&T Texas asserts that the FTA states that an agreement must be made available for a reasonable period of time, but that UTEX's proposal is not reasonable, and the proposed structure is unwieldy, utilizing a separate agreement that extends past the life of the ICA that it is tied to and therefore has no supporting terms and conditions (e.g. billing, dispute resolution etc.).⁴⁷³

Arbitrators' Decision

The Arbitrators do not adopt UTEX's proposed language for the reasons set forth by AT&T Texas.

Unescorted Access***DPL Issue: AT&T Collo-8***

Should UTEX have unescorted access to a Collocation area prior to: 1) AT&T Texas's turnover of the area to UTEX and; 2) the time UTEX has obtained the necessary security clearance?

UTEX's Position

UTEX offers no argument in support of unescorted access to its collocation spaces prior to their having been turned over by AT&T Texas.

AT&T Texas's Position

AT&T Texas proposes language to prevent UTEX from having unescorted access to its collocation space until after AT&T Texas has turned over the space to UTEX. AT&T Texas argues that such a restriction is reasonable and practical for safety reasons. Additionally, AT&T Texas said that UTEX's position and language on this issue are not compliant with Order 27. In any event, UTEX may, at any time before its collocation spaces have been turned over to it, request an *escorted* site visit. AT&T Texas requests the Commission to rule in its favor and not allow UTEX to have exemption from restrictions that apply to every other carrier.⁴⁷⁴

⁴⁷³ Joint Ex. 1, Joint DPL, at AT&T Collo-7.

⁴⁷⁴ AT&T Texas Ex. 11, Hamiter Direct, at 24:7-17.

Arbitrators' Decision

The Arbitrators adopt AT&T Texas's proposed language because it is reasonable.

xDSL Service**AT&T Issue xDSL-1**

What are the appropriate terms and conditions for xDSL?

UTEX's Position

UTEX states that DSL did not receive much attention in the testimony, but it should not be a controversial subject. UTEX states that the Commission has approved essentially the same set of DSL-related attachments for all CLECs, although the terms have evolved a bit over time. UTEX further states, however, that it has never been able to secure any DSL terms for several reasons, despite multiple attempts. UTEX requests that the Arbitrators provide for a full and complete set of DSL-related terms so that UTEX can finally have *TRO/TRRO* compliant UNEs, including not only the basic terms but also all those necessary to provide "loop conditioning" (e.g. remove load coils and bridge tap) as required, at all loop lengths for which the Commission has approved terms and types.

UTEX states that it is proposing its original 2005 DSL terms, and that those should be approved.⁴⁷⁵

AT&T Texas's Position

AT&T Texas proposes its xDSL Attachment⁴⁷⁶ and asserts that it is consistent with federal law. AT&T Texas states that under the attachment, it cannot limit xDSL capable loops strictly to the provisioning of ADSL. AT&T Texas further states that its language would preclude it from imposing any limits on the transmission speeds of xDSL services or technologies to a level at or below those provided by AT&T Texas. Further, AT&T Texas maintains that, under its proposed language, it cannot deny a CLEC's request to deploy any loop technology that is presumed acceptable for deployment unless AT&T Texas has demonstrated to the Commission that the

⁴⁷⁵ UTEX Initial Br. at 181.

⁴⁷⁶ Joint Ex. 1, Joint DPL, at AT&T xDSL-1.

technology will significantly degrade the performance of other advanced services or voice band services in accordance with FCC rules.⁴⁷⁷ AT&T Texas supports its definition of an xDSL capable loop by quoting its proposed language almost verbatim, but provides no support for that definition. AT&T Texas states that its language provides that unresolved disputes arising under the xDSL Attachment will be handled through the dispute resolution procedures set forth in the Agreement and requires both parties to follow the liability and indemnification clauses within the attachment.⁴⁷⁸

AT&T Texas states that the FCC has indicated⁴⁷⁹ that new technologies that have never been deployed must be approved by the FCC or a state commission or have been successfully deployed by another carrier without degrading the performance of others using the network. AT&T Texas claims that its language in §§ 4.6 and 4.6.1 properly requires UTEX to work with AT&T Texas and the Commission when deploying new technology. AT&T Texas charges that UTEX omits language that requires UTEX to demonstrate that the technology it is deploying will not degrade the performance of other advanced services or traditional voice band service, and that this requirement is consistent with federal law. AT&T Texas further states that UTEX would improperly omit language regarding cooperative testing on a time and material basis. AT&T Texas says that its language properly requires UTEX to submit a Bona Fide Request (BFR) for a new offering if UTEX desires to deploy a technology that is not offered by AT&T Texas.⁴⁸⁰

AT&T Texas contends that its xDSL Attachment accurately reflects those specific types of xDSL loops that are available today. AT&T Texas maintains that UTEX's proposed language does not reflect the current requirements for the most current forms of xDSL loops that AT&T Texas must provide to requesting carriers.⁴⁸¹

AT&T Texas states that its proposed attachment is currently in place with many CLECs in Texas, and that it has been reviewed and accepted by the Commission. In addition, AT&T Texas states that its proposed attachment accurately reflects the Pricing Schedule, while UTEX has

⁴⁷⁷ 47 C.F.R. § 51.230.

⁴⁷⁸ AT&T Texas Ex. 13, Direct Testimony of Richard Hatch (Hatch Direct), at 19:19-20:8.

⁴⁷⁹ 47 C.F.R. § 51.230.

⁴⁸⁰ AT&T Texas Ex. 13, Hatch Direct, at 21:11-22:2.

⁴⁸¹ AT&T Texas Ex. 9, Niziolek Direct, at 56:2-5.

simply chosen to incorporate unsubstantiated rates within its version of the xDSL attachment, rather than in a pricing schedule, which AT&T Texas asserts is inappropriate. AT&T Texas goes on to state that the rates proposed by UTEX are not accurate, citing as an example the rates reflected by UTEX within its Appendix 1 DSL, which include rates for 2-wire analog loops and 4-wire digital distribution sub-loops, neither of which are actually xDSL type loops. UTEX also lists ISDN/IDSL loops, which are not available as a wholesale service. Further, many of the rates that UTEX proposes do not match those in the approved AT&T Texas Pricing Schedule.⁴⁸²

Arbitrators' Decision

The Arbitrators conclude that AT&T Texas's proposed terms for xDSL should be included in the ICA because those terms are more comprehensive and are reasonable. AT&T Texas's terms are identical to those approved in Docket No. 28821 for CJP.

AT&T Issue xDSL-2

Should the Appendix define the types of xDSL loops offered by AT&T?

UTEX's Position

UTEX states that it is proposing its original 2005 DSL terms, and that those should be approved.⁴⁸³

AT&T Texas's Position

AT&T Texas states that it offers many different types of DSL and that its proposed language defines them. AT&T Texas points out that the "x" in xDSL is a place holder for the various types of DSL services offered, and that each type has its own Power Spectral Density (PSD) mask⁴⁸⁴ that may be requested when the CLEC places its order. AT&T cites the example of Asymmetric Digital Subscriber Line (ADSL), which has a PSD-5 mask. Citing FCC rules,⁴⁸⁵ AT&T Texas contends that the reason for defining xDSL type services is to determine the type of DSL that is being placed on the loop by the CLEC, and that by requiring the CLEC to order

⁴⁸² *Id.* at 56:7-17.

⁴⁸³ UTEX Initial Br. at 181.

⁴⁸⁴ 47 C.F.R. § 51.231.

the DSL service using a PSD mask, AT&T Texas can be assured that the CLEC is not placing a service on the loop that could degrade the performance of other services.⁴⁸⁶

AT&T Texas contends that UTEX's proposed language improperly omits language that requires UTEX to demonstrate that the technology it is deploying will not degrade the performance of other advanced services or traditional voice band service and that this requirement is consistent with federal law. UTEX's language would also improperly omit language on cooperative testing on a time and material basis. AT&T Texas' states that its proposed language properly requires UTEX to submit a BFR for a new offering if UTEX desires to deploy a technology that is not offered by AT&T Texas.⁴⁸⁷

Arbitrators' Decision

The Arbitrators find that UTEX has offered no argument supporting its proposed language. The Arbitrators further find AT&T Texas's proposed language to be reasonable, and identical to that approved by the Commission for CJP in Docket No. 28821, and adopt AT&T's proposed language.

AT&T Issue xDSL-3

Should § 4.4 of AT&T's proposed Attachment 25: xDSL be included?

UTEX's Position

UTEX states that it is proposing its original 2005 DSL terms, and that those should be approved.⁴⁸⁸

AT&T Texas's Position

AT&T Texas states that its proposed language is sound and mirrors the FCC's rules on technologies that have never been deployed or for which there are no existing spectral compatibility standards. AT&T Texas states that its language is good for all parties involved and protects other carriers who might be harmed by signal interference on AT&T Texas's facilities.

⁴⁸⁵ 47 C.F.R. § 51.233.

⁴⁸⁶ AT&T Texas Ex. 13, Hatch Direct, at 20:16-21:6.

⁴⁸⁷ *Id.* at 21:18-22:2.

AT&T Texas contends that UTEX is proposing the same language. AT&T Texas states that the Commission ordered this language in its Rhythms/Covad Award in Docket Nos. 20226 and 20272.⁴⁸⁹

Arbitrators' Decision

The Arbitrators find that the parties are proposing identical language. The Arbitrators further find the proposed language to be reasonable, and identical to that approved by the Commission for the CJP in Docket No. 28821, and they adopt the parties' proposed language.

AT&T Issue xDSL-4

Should § 5.2 of AT&T's proposed Attachment 25: xDSL be included?

UTEX's Position

UTEX states that it is proposing its original 2005 DSL terms, and that those should be approved.⁴⁹⁰

AT&T Texas's Position

AT&T Texas states that its proposed language is reflective of the FCC's decision that an ILEC must provide CLECs with "nondiscriminatory access to the same detailed information about the loop that is available to the [ILEC]."⁴⁹¹ AT&T Texas's proposed language states, "AT&T TEXAS shall provide actual, real-time loop makeup information to CLEC via the loop qualification process." AT&T Texas contends that UTEX's proposed language adds additional caveats that are not included within AT&T Texas's proposed language. UTEX's proposed language states, "Subject to Sections 5.3 and 5.4 below, SWBT must provide actual, real-time loop makeup information to UTEX rather than a prequalification or loop qualification process." AT&T Texas contends that UTEX is attempting to place additional requirements onto Loop Qualification (UTEX Sections 5.3 and 5.4), alluding to some other manner in which AT&T

⁴⁸⁸ UTEX Initial Br. at 181.

⁴⁸⁹ AT&T Texas Ex. 13, Hatch Direct, at 22:5-15.

⁴⁹⁰ UTEX Initial Br. at 181.

⁴⁹¹ AT&T Texas Ex. 9, Niziolek Direct, at 58:6-8 (citing 47 C.F.R. §51.319(g) and *TRO* ¶¶ 567-568 & FNs 739 and 745).

Texas must provide the information, but is silent regarding the details of the other manner or process.

AT&T Texas states that UTEX's language is unclear and creates uncertainty regarding AT&T Texas's requirement to provide loop makeup information.⁴⁹²

Arbitrators' Decision

The Arbitrators find that, while UTEX has proposed a set of terms, it offers no arguments in support of these, nor does it offer arguments in opposition to the terms offered by AT&T Texas. Conversely, AT&T Texas offers arguments in support of its proposed terms and against those offered by UTEX. UTEX does not rebut AT&T Texas's arguments. The Arbitrators find AT&T Texas's proposed language to be reasonable, and note that these are the same as terms in the CJP ICA approved in Docket No. 28821. The Arbitrators adopt AT&T Texas's proposed terms for xDSL. However, the Arbitrators conclude that the reference to the rates in the Pricing Schedule in Attachment 25 relating to xDSL shall not be the pricing schedule. Consistent with the Arbitrators' decision in connection with DPL issue AT&T PR-1 to adopt the pricing schedule Attachment 30 in the CJP-AT&T Texas ICA, approved in Docket No. 28821, the prices for xDSL rate elements contained in the pricing schedule in the CJP-AT&T Texas ICA will apply.

OSS and Ordering

DPL Issues: UTEX 52 through UTEX 55, AT&T Resale-8, AT&T UNE-18 & UNE-25, AT&T OSS-1 & OSS-2, AT&T NIM-7, NIM-8, NIM 2-6 (a) & (b), NIM 2-12, NIM 2-13, and NIM 3-8

UTEX's Position

UTEX states that it is willing to use AT&T Texas's operations support systems (OSS) to pre-order, order, or secure provisioning if those systems are functioning and effective.⁴⁹³ UTEX further states that it will use forms developed through collaborative processes if and when they become available, but that the lack of a standard form cannot be used to deny access.⁴⁹⁴ UTEX states, for example, that AT&T Texas's OSS does not have a method to pre-order, order, or

⁴⁹² *Id.* at 58:6-59:10.

⁴⁹³ UTEX Initial Br. at 133.

secure provisioning of several UNEs or methods to access UNEs, including loops to a pole and subloops.⁴⁹⁵ UTEX states that AT&T Texas does not have forms for ISDN and has refused UTEX's multiple requests that such forms be created.⁴⁹⁶ UTEX also states that it was not able to use the BFR process to order dark fiber, B links, or ISDN under a prior ICA.⁴⁹⁷ UTEX's proposed language allows it to manually order an item if AT&T Texas does not have an ordering form that works.⁴⁹⁸ UTEX also proposes a liquidated damages provision so that it can conduct business as if AT&T Texas is going to perform under the ICA.⁴⁹⁹ UTEX states that 120 days would be a reasonable time to develop ordering processes and forms from start to finish and that the Commission should stay involved in the development process.⁵⁰⁰

UTEX states that AT&T Texas uses its processes to delay, deny, overcharge, or obstruct access to UNEs it does not like.⁵⁰¹ The lack of a standard form cannot be used to deny UTEX access to interconnection or UNEs.⁵⁰² UTEX states that AT&T Texas's suggestion that UTEX be denied access to a UNE or interconnection allowed by the ICA until forms and procedures are developed through the Change Management Process (CMP), CLEC User Forum (CUF), the BFR process, or the BFR-like implementation team⁵⁰³ is illegal.⁵⁰⁴

UTEX states that AT&T Texas cannot impose charges for incurring costs that relate to facilities/trunks, including the ordering and provisioning, that lie on its side of the POI.⁵⁰⁵ If AT&T Texas can impose ordering charges on UTEX, then UTEX should be able to impose charges on AT&T Texas for the activities UTEX must undertake to order and provision facilities/trunks on UTEX's side of the POI. UTEX also states that AT&T Texas cannot be

⁴⁹⁴ *Id.* at 134.

⁴⁹⁵ *Id.* at 133.

⁴⁹⁶ Joint. Ex. 1, Joint DPL, at AT&T NIM 3-8, UTEX Position.

⁴⁹⁷ Tr. (Feldman) at 559:9-562:3 (Apr. 15, 2010).

⁴⁹⁸ *Id.* at 581:22-24.

⁴⁹⁹ *Id.* at 561:23-25.

⁵⁰⁰ *Id.* at 582:12-583:8.

⁵⁰¹ UTEX Initial Br. at 133.

⁵⁰² *Id.* at 134.

⁵⁰³ *See* Tr. (Christensen) at 580:22-581:4 (Apr. 15, 2010).

⁵⁰⁴ UTEX Initial Br. at 134.

⁵⁰⁵ Joint. Ex. 1, Joint DPL, at AT&T NIM-7, UTEX Position.

given the ability to unilaterally impose duties or change ICA terms by crafting something and putting it up on a web site.⁵⁰⁶ According to UTEX, what AT&T Texas is wholly ignoring is that when it comes to interconnection UTEX is a LEC and a peer; it is not an AT&T Texas customer that is or can be required to buy some “product.”

In response to AT&T Texas’s statements regarding the information UTEX must provide to order interconnection trunks and facilities, UTEX states that it has requested that AT&T Texas engage UTEX in the creation and inclusion of detailed call flow diagrams for rating, routing, signaling, and trunking and UTEX would welcome examples.⁵⁰⁷ To date (for over 7 years now) AT&T Texas has refused to discuss any of this.

AT&T Texas’s Position

AT&T Texas’s OSS appendix states that it “sets forth terms and conditions for nondiscriminatory access to Operations Support Systems (OSS) ‘functions’ to UTEX for pre-ordering, ordering, provisioning, maintenance/repair, and billing provided by AT&T Texas.”⁵⁰⁸ AT&T Texas states that this appendix includes virtually the same terms and conditions approved for other CLECs in Docket No. 28821 and in the successor T2A agreements.⁵⁰⁹ AT&T Texas states that its appendix provides complete terms and conditions for nondiscriminatory access to its OSS functions for resale and UNEs⁵¹⁰ and disagrees with UTEX’s unsupported premise that its OSS does not have a method to pre-order, order, or obtain provisioning for a specific UNE or interconnection.⁵¹¹ AT&T Texas further states that UTEX scattered OSS terms throughout its proposed contract language, which causes confusion and uncertainty.⁵¹² AT&T Texas states that it is not appropriate to address ordering system implementation in the NIM appendix and that AT&T Texas addresses this in the CLEC Handbook on the AT&T Texas CLEC Website.⁵¹³

⁵⁰⁶ *Id.* at AT&T NIM-8, UTEX Position.

⁵⁰⁷ *Id.* at AT&T NIM 2-12, UTEX Position.

⁵⁰⁸ Joint Ex. 3, Contested ICA Language, at 49 (Appendix OSS § 1.1).

⁵⁰⁹ AT&T Initial Br. at 59-60.

⁵¹⁰ *Id.* at 59.

⁵¹¹ Joint. Ex. 1, Joint DPL, at UTEX 52, AT&T Texas Position.

⁵¹² AT&T Texas Initial Br. at 59.

⁵¹³ Joint. Ex. 1, Joint DPL, at AT&T NIM-7, AT&T Texas Position.

AT&T Texas states that its OSS appendix reflects a decade of collaborative OSS development activities between AT&T Texas and hundreds of participating CLECs and reflects daily operational requirements impacting all CLECs.⁵¹⁴ Specifically, AT&T Texas developed its OSS with direct input from CLECs via the Ordering and Billing Forum (OBF) and the CMP.⁵¹⁵ The OBF is a forum in which customers and providers have direct input into issues affecting ordering, billing, provisioning, and the exchange of information about access services.⁵¹⁶ The CMP is a Commission-sanctioned process consisting of monthly collaborative sessions that provide CLECs the opportunity to request changes and enhancements to AT&T Texas's OSS.⁵¹⁷ The objective of the CMP is to facilitate improvements while ensuring that standard methods and procedures are followed and consistency maintained, thereby eliminating or minimizing possible negative impacts of system changes on service level commitments.⁵¹⁸

AT&T Texas states that it utilizes industry standard ordering processes such as the Local Service Request (LSR) process and the Access Service Request (ASR) process.⁵¹⁹ LSR order submission is standard industry process for ordering local exchange services while the ASR process is an industry standard process for ordering access services. Both LSR and ASR processes have been collaboratively designed and refined within the OBF. AT&T Texas states that UTEX is attempting to disregard industry guidelines established for all CLECs.⁵²⁰ AT&T Texas further states that UTEX's proposed terms reflect UTEX's one-sided and self-serving approach.⁵²¹

Regarding ordering of interconnection, AT&T Texas states that CLLI codes and Point codes are required when interconnecting with an SS7 signaling interface and requesting trunks and facilities from AT&T for interconnection.⁵²²

⁵¹⁴ AT&T Texas Initial Br. at 59; AT&T Ex. 5, Direct Testimony of Frederick Christensen (Christensen Direct), at 7:8-10.

⁵¹⁵ AT&T Initial Br. at 60.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ Joint Ex. 1, Joint DPL, at AT&T NIM-7, AT&T Texas Position.

⁵²⁰ *Id.*

⁵²¹ AT&T Initial Br. at 59.

⁵²² Joint Ex. 1, Joint DPL, at AT&T NIM 2-12, AT&T Texas Position.

In response to UTEX's statements regarding the lack of a process to order certain UNEs or methods of access to UNEs, AT&T Texas states that BFRs enable CLECs to request a UNE, UNE combination, or commingled arrangement that is not currently available.⁵²³ AT&T Texas states that the BFR process was approved by the Commission in the T2A dockets, was developed in collaboration with the CLEC community, has worked for Texas CLECs for years, and will work for UTEX.⁵²⁴ AT&T Texas further states that disputes regarding the BFR process should be addressed using the ICA's dispute resolution process before either party brings the issue to the Commission for resolution.⁵²⁵

In response to UTEX's statements regarding ordering charges, AT&T Texas states that there are costs associated with the processing of both LSRs and ASRs and that AT&T Texas has the right to recover those costs from the cost causer.⁵²⁶ AT&T Texas states that this is no different than if AT&T Texas were to submit an LSR or an ASR to a CLEC. In that case, the CLEC charges AT&T Texas for processing AT&T's request. Such ordering charges are simply a cost of doing business.

Arbitrators' Decision

The Arbitrators conclude that AT&T Texas's proposed OSS Appendix, OSS terms in Attachment 1 Resale (§§ 3-3.4.2), OSS terms in Attachment NIM (§ 2.1), and OSS terms in Appendix 2 to Attachment NIM (§§ 2.3, 2.3.1, 2.3.2, 9.2, and 9.3) should be included in the ICA.⁵²⁷ AT&T Texas's terms describe OSS access procedures that were developed through collaborative industry processes to serve hundreds of participating CLECs,⁵²⁸ and those terms provide nondiscriminatory access to AT&T Texas's OSS functions.⁵²⁹ The Arbitrators agree with AT&T Texas that UTEX should be required to provide the appropriate location identifiers for ordering trunks and facilities for interconnection because such codes are required for

⁵²³ AT&T Texas Reply Br. at 24-25.

⁵²⁴ AT&T Texas Reply Br. at 25.

⁵²⁵ AT&T Texas Ex. 9, Niziolek Direct, at 55:4-12.

⁵²⁶ Joint Ex. 1, Joint DPL, at AT&T NIM-7, AT&T Texas Position.

⁵²⁷ Consistent with the Arbitrators' decision regarding the UNE appendix, however, the ICA shall not include AT&T Texas's proposed term "Lawful UNE."

⁵²⁸ AT&T Texas Ex. 5, Christensen Direct, at 7:8-10 & 7:24-8:3.

⁵²⁹ *Id.* at 7:12-14.

interconnection and UTEX did not explain why it should not provide such codes.⁵³⁰ The Arbitrators decline to adopt UTEX's proposed OSS terms, which are scattered throughout the ICA and do not appear to be comprehensive.

The Arbitrators also conclude, however, that AT&T Texas may not use its OSS procedures to deny UTEX access to the products and services it is entitled to under this ICA. The Arbitrators note, for example, that AT&T Texas did not specifically refute UTEX's claim that UTEX was unable to use the BFR process to order dark fiber under a prior ICA.⁵³¹ Consequently, the Arbitrators conclude that AT&T Texas shall provide UTEX with procedures for pre-ordering, ordering, provisioning, and other OSS functions for products and services to which UTEX is entitled under this ICA and for which such procedures do not currently exist within 120 days of UTEX's request for such procedures. AT&T Texas may use the BFR process and the parties may establish interim procedures, including manual ordering, within the 120 day period until permanent procedures are put in place. AT&T Texas shall work collaboratively with UTEX to create such procedures. Any interim procedures should not unduly delay UTEX's access to the products and services that it is entitled to under this ICA. The Arbitrators conclude that 120 days is a reasonable time period because AT&T Texas stated that the BFR process takes 120 days⁵³² and because UTEX stated that 120 days is not unreasonable.⁵³³ If AT&T Texas denies a request by UTEX for pre-ordering, ordering, or provisioning of a product or service requested by UTEX, AT&T Texas shall provide written notice to UTEX of such denial and the basis thereof. If UTEX disputes such denial or if AT&T Texas fails to comply with the 120 day deadline, UTEX may request an expedited ruling pursuant to Commission rules, notwithstanding any other provisions of the ICA addressing dispute resolution. The Arbitrators direct the parties to draft ICA language implementing these requirements. If the parties cannot agree to such language, each party shall include its proposed language and the reasons supporting its adoption in the party's exceptions to the Proposal for Award.

The Arbitrators also conclude that UTEX's proposed language prohibiting charges for interconnection orders should not be included in the ICA. UTEX's language is not consistent

⁵³⁰ Joint Ex. 1, Joint DPL, at AT&T NIM 2-12, AT&T Texas Position.

⁵³¹ Tr. (Niziolek) at 562:18-22 (Apr. 15, 2010).

⁵³² Tr. (Christensen) at 559:3-6 (Apr. 15, 2010).

⁵³³ Tr. (Feldman) at 582:24-583:5 (Apr. 15, 2010).

with FTA § 252(d)(1), which states that an ILEC may recover the costs of providing interconnection and a reasonable profit.⁵³⁴

Finally, the Arbitrators conclude that §§ 2-2.5.2 of AT&T Texas's OSS appendix should not be included in the ICA. Those paragraphs address UNE unbundling requirements, and the Arbitrators have addressed the appropriate language for such requirements in response to DPL issues AT&T UNE 1 through UNE 25.

E911 Service

AT&T E911-1

Should terms and conditions for emergency services (E911) continue to be included in a separate attachment or added at the end of the Public Safety, Network Security and Law Enforcement attachment?

UTEX's Position

UTEX does not directly address this question; however it does offer a separate Public Safety attachment.

AT&T Texas's Position

AT&T Texas asserts that terms and conditions for E911 emergency services should be maintained in a separate attachment, as they are currently. It states that emergency services require comprehensive terms and conditions that are independent of other contract provisions, and that UTEX's proposal to append E911 at the end of another attachment would make these provisions difficult to administer, since that would be inconsistent with AT&T Texas's other ICAs. AT&T Texas states that ease of contract administration to avoid confusion is important for these critical services. AT&T Texas states that UTEX offers no justification for relocating E911 terms and conditions (its position statement for this issue (3/26/10 DPL) is silent on the actual question at hand), and its proposal should be rejected.⁵³⁵

⁵³⁴ 47 U.S.C. § 252(d)(1).

⁵³⁵ AT&T Texas Ex. 21, Pellerin Direct, at 76:25-77:6.

Arbitrators' Decision

The Arbitrators agree with AT&T Texas's position, and finding no instance in which UTEX addresses this issue, conclude that the terms and conditions for E911 services should continue to be included in a separate attachment.

AT&T Issue E911-2

What are the appropriate definitions for E911 Universal Emergency Number Service; Automatic Number Identification (ANI); and Automatic Location Identification (ALI)? Should the term Emergency Services Number (ESN) be included and if so, what is the proper definition?

UTEX's Position

UTEX does not directly address this issue.

AT&T Texas's Position

AT&T Texas states that its definitions supply the appropriate detail to avoid ambiguity and allow the parties to provide critical E911 service. AT&T Texas has added a definition for ESN, since that term is utilized in the Texas Pricing Schedule/E911 now applicable in Texas. AT&T Texas maintains that its definitions are consistent with the National Emergency Number Association (NENA) glossary and also match those set forth in P.U.C. SUBST. R. 26.433.⁵³⁶

Arbitrators' Decision

The Arbitrators find benefit in consistency between the definitions of the ICA and those of NENA. Because UTEX did not challenge AT&T Texas's proposed definitions, the Arbitrators adopt those definitions.

AT&T Issue E911-3

Should the defined term Selective Routing also include the concept of a Control Office? If not, should UTEX's undefined term Control Office be utilized in the agreement?

UTEX's Position

UTEX does not directly address this issue.

⁵³⁶ Joint Ex. 1, Joint DPL, at AT&T E911-2.

AT&T Texas's Position

AT&T Texas states that the terms E911 Selective Router (SR) and E911 Control Office mean the same thing in the industry, and that UTEX proposed to use the term Control Office but did not propose a definition. Since the terms are interchangeable, rather than disputing UTEX's use of an undefined term, AT&T Texas proposes to include Control Office in the definition of Selective Routing. AT&T Texas further states that the term Control Office should not be utilized in the agreement unless it is clearly defined.⁵³⁷

Arbitrators' Decision

The Arbitrators find the definition offered by AT&T Texas to be accurate and useful. Because UTEX did not challenge AT&T Texas's proposed definition, the Arbitrators adopt that definition.

AT&T E911-5

Is it appropriate to limit AT&T Texas's obligations to provide 911-related services to UTEX to those circumstances where UTEX is certified as a CLEC and AT&T Texas is the E911 service provider?

UTEX's Position

UTEX states that it is certificated statewide and that AT&T Texas is not "the 911 service provider;" that is what a 911 entity does. Where AT&T Texas is operating a database or an SR, UTEX is willing to have reasonable terms that will handle 911 calls for Legacy/POTS calls. UTEX maintains that AT&T Texas is inappropriately trying to use 911 issues as a means to maintain AT&T Texas's legacy business model and legacy technology or to thwart alternative ways that users are communicating today and will want to communicate tomorrow.⁵³⁸

AT&T Texas's Position

AT&T Texas states that it should be obligated to provide E911-related services to UTEX only for those areas where UTEX is certified as a CLEC and where AT&T Texas is also the E911 service provider, and proposes language supporting that premise. While AT&T Texas

⁵³⁷ Joint Ex. 1, Joint DPL, at AT&T E911-3.

⁵³⁸ UTEX Initial Br. at 195.

recognizes that UTEX is certificated as a CLEC statewide, they contend that this status might change in the future. Moreover, other CLECs that may not be certified in AT&T Texas's entire operating area may elect to adopt UTEX's ICA pursuant to FTA § 252(i).⁵³⁹

Arbitrators' Decision

The Arbitrators find that, while it is true that UTEX is certificated statewide, UTEX is not harmed by provisions in the ICA that anticipate other circumstances, nor do such provisions have any bearing on the perpetuation of AT&T Texas's legacy systems. The Arbitrators concur with AT&T Texas that, given the fact that another CLEC whose certification is not statewide might adopt UTEX's ICA and that UTEX's service area may change in the future, it is appropriate for the ICA to provide that AT&T Texas will populate its 911 database with UTEX data in those areas in which UTEX provides service. Finally, the Arbitrators find reasonable AT&T Texas's argument that it should be obligated to provide E911-related services to UTEX only for those areas where UTEX is certified as a CLEC and where AT&T Texas is also the E911 service provider. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-6

Should the agreement contain AT&T Texas's language regarding how it will handle the information it receives from UTEX and relays to the PSAP when processing an E911 call?

UTEX's Position

UTEX states that, while it is happy to follow the implementation described by Mr. Neinast at the hearing, it does not believe that it must be compelled to do so in the future should UTEX determine that it can better satisfy its regulatory and statutory requirements by means of another implementation. Its other comments focus on UTEX's contention that AT&T Texas is seeking a contractual mechanism by which to obstruct UTEX's right to interconnect.⁵⁴⁰ UTEX offers no contract language addressing this issue.

⁵³⁹ AT&T Texas Ex. 21, Pellerin Direct, at 77:22-78:2.

⁵⁴⁰ UTEX Ex. 3, Feldman Rebuttal, at 77:11-21.

AT&T Texas's Position

AT&T Texas asserts that language proposed by AT&T Texas follows industry standards for routing E911 traffic, in which the End User Customer's telephone number or ANI is used first as a steering device by the SR to determine the appropriate public safety answering point (PSAP) for the call to be delivered. This is accomplished by the SR launching a query into the SR database ("SRDB") to see if there is a match for the ANI digits. Without the description provided by AT&T Texas's proposed language, there is no way to define the expectations for call completion between UTEX, AT&T Texas, and the PSAP that the caller is attempting to reach.⁵⁴¹

Arbitrators' Decision

The FTA places no requirements on incumbent local exchange carriers to update their technology. The Arbitrators find the proposed AT&T Texas language to be appropriate for the handling of information it receives from UTEX in the processing of E911 calls and adopt this language.

AT&T E911-7

What are the appropriate trunking requirements between the SR and the 911 customer PSAP?

UTEX's Position

UTEX maintains that its proposed terms adequately address trunking requirements.⁵⁴²

AT&T Texas's Position

AT&T Texas contends that the language it proposes in Attachment E911 § 2.2 creates the obligation for AT&T Texas to provide and maintain the 911 trunks from its SR to the PSAP per its tariff, and that to delete this language would create ambiguity that may hinder the 911 network, as this is a shared network used by all carriers attempting to reach a given PSAP.⁵⁴³

⁵⁴¹ AT&T Texas Ex. 19, Neinast Direct, at 12:12-19.

⁵⁴² UTEX Initial Br. at 195.

⁵⁴³ AT&T Texas Ex. 19, Neinast Direct, at 13:3-7.

Arbitrators' Decision

The Arbitrators find that the language proposed by AT&T Texas addresses its responsibility to provide trunking to the PSAP that is adequate for the 911 traffic generated by all of its customers. AT&T Texas's proposed language comports with that approved by the Commission for the CLEC Coalition ICA in Docket No. 28821. UTEX offers no competing language. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-8

Should AT&T Texas's language regarding provision of facilities UTEX may utilize for E911 interconnection be included?

UTEX's Position

UTEX states that if it needs facilities to get to a SR, it should be able to obtain them as UNEs or on cost-based terms as part of interconnection, but offers no support for that contention.⁵⁴⁴ UTEX proposes no language directly addressing this issue.

AT&T Texas's Position

AT&T Texas maintains that it is not obligated to provide E911 facilities on a TELRIC basis.⁵⁴⁵

Arbitrators' Decision

The Arbitrators find that UTEX has offered no authority supporting its contention that it should be able to obtain E911 facilities on a cost-based basis (TELRIC pricing), nor is this contention supported by FCC rulings or orders. The Arbitrators, therefore, adopt the language proposed by AT&T Texas.

AT&T E911-9

Should the agreement address AT&T Texas's E911 database responsibilities?

⁵⁴⁴ UTEX Initial Br. at 195.

⁵⁴⁵ AT&T Texas Ex. 21, Pellerin Direct, at 79:10-11.

UTEX's Position

UTEX states that its proposed terms adequately address AT&T Texas's responsibilities in management of the E911 database,⁵⁴⁶ but offers no language directly addressing this issue.

AT&T Texas's Position

AT&T Texas proposes language for the SR/ALI database that is used for E911 routing by the SR and ALI queries used by the PSAPs. AT&T Texas states that its proposed language clearly spells out the responsibilities and eliminates ambiguity that could result in routing or ALI errors, and describes the practice in use by all other carriers where AT&T Texas is the E911 provider.⁵⁴⁷

Arbitrators' Decision

AT&T Texas's proposed language comports with that approved by the Commission for the CLEC Coalition ICA in Docket No. 28821. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-10

Should the agreement contain the appropriate trunking requirements for E911 service between UTEX and AT&T Texas's SR?

UTEX's Position

UTEX states that its proposed terms adequately address trunking requirements.⁵⁴⁸ UTEX offers no argument directly supporting its proposed language in §§ 9.0 and 9.1.

AT&T Texas's Position

AT&T Texas claims that its proposed language provides the specifics necessary to ensure that UTEX's end users have access to E911 services, and that absent this language, there is nothing in the contract that describes what needs to be done to create the needed E911 trunks.⁵⁴⁹ AT&T Texas further states that UTEX may have relationships with other carriers, but these are

⁵⁴⁶ UTEX Initial Br. at 195.

⁵⁴⁷ AT&T Texas Ex. 19, Neinast Direct, at 14:4-8.

⁵⁴⁸ UTEX Initial Br. at 195.

⁵⁴⁹ AT&T Texas Ex. 19, Neinast Direct, at 14:12-16.

wholesale customers, not end users, and that there is a clear distinction between the two. Retail end users of UTEX would need to obtain E911 services, but if UTEX terminates traffic for another carrier, this does not fall into the same category as a retail end user. The third party carrier would be obligated to obtain E911 services for its end users, not UTEX. Therefore, it is inappropriate for UTEX to propose language in its ICA to care for a third party carrier that is not a party to this agreement. AT&T Texas maintains that the Commission should reject UTEX's language as it is in the best interest of public policy to provide E911 service to retail end users.⁵⁵⁰

Arbitrators' Decision

The Arbitrators find that AT&T Texas's proposed language generally comports with that approved by the Commission for the CLEC Coalition ICA in Docket No. 28821. To the extent that it adds to that approved language, the Arbitrators find the additions to be reasonable. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-11

Should the agreement address handling of E911 network maintenance problems?

UTEX's Position

UTEX claims that the terms it proposes are adequate,⁵⁵¹ but offers no language directly relating to E911 maintenance.

AT&T Texas's Position

AT&T Texas asserts that the language it proposes in § 2.5h describes the maintenance necessary for E911 trunks and specifies which party is responsible for the various aspects of troubleshooting E911 related problems. AT&T Texas states that the Commission should approve AT&T Texas's proposed language, which brings clarity and certainty to the agreement in defining the parties' respective responsibilities.⁵⁵²

⁵⁵⁰ *Id.* at 14:21-15:8.

⁵⁵¹ UTEX Initial Br. at 195.

⁵⁵² AT&T Texas Ex. 19, Neinast Direct, at 15:10-17.

Arbitrators' Decision

The Arbitrators find that the language proposed by AT&T Texas was approved for the CLEC Coalition ICA in Docket No. 28821 and is appropriate for inclusion in this ICA. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-12

Should the agreement contain language setting forth UTEX's E911 database responsibilities?

UTEX's Position

UTEX contends that its proposed terms are adequate,⁵⁵³ but offers no language regarding its E911 database responsibilities.

AT&T Texas's Position

AT&T Texas proposes language that comports with that approved in Docket No. 28821.

Arbitrators' Decision

The Arbitrators find that the language proposed by AT&T Texas was approved for the CLEC Coalition ICA in Docket No. 28821 and is appropriate for inclusion in this ICA. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-13

Should the agreement make clear that UTEX must handle E911 surcharges applicable to its End Users?

UTEX's Position

UTEX contends that it is not asking AT&T Texas to be responsible for any E911 surcharges that may apply to any of UTEX's customers or the patrons of its customers but that AT&T Texas's proposed terms employ an unreasonable and anticompetitive definition and use of "End User" in the context of UTEX's business and model.⁵⁵⁴ UTEX offers no competing language.

⁵⁵³ *Id.* at 196.

⁵⁵⁴ *Id.*

AT&T Texas's Position

AT&T Texas proposes language that comports with that approved in Docket No. 28821.

Arbitrators' Decision

The Arbitrators find that the language proposed by AT&T Texas was approved for the CLEC Coalition ICA in Docket No. 28821 and is appropriate for inclusion in this ICA. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-14

Which party's language regarding Methods and Practices should be included?

UTEX's Position

UTEX proposes language,⁵⁵⁵ but offers no argument directly supporting it.

AT&T Texas's Position

AT&T Texas contends that, unlike that of UTEX, its proposed language is more specific and is properly limited to those rules and regulations that are "applicable." In addition, AT&T Texas further states that its language clearly delineates that the NENA standards will be used, rather than just industry standards, as UTEX proposes.⁵⁵⁶

Arbitrators' Decision

The Arbitrators concur with AT&T Texas, finding its language to be more specific and appropriate. The Arbitrators further find that AT&T Texas's proposed language was approved for the CLEC Coalition ICA in Docket No. 28821. The Arbitrators adopt AT&T Texas's proposed language.

AT&T E911-15

Should the agreement contain terms and conditions regarding E911 customer specifications?

⁵⁵⁵ UTEX Initial Br. at 196.

⁵⁵⁶ AT&T Texas Ex. 19, Neinast Direct, at 16:9-14.

UTEX's Position

UTEX states that its proposed terms and conditions regarding E911 customer specifications should be used,⁵⁵⁷ but it offers no argument in support of that contention.

AT&T Texas's Position

AT&T Texas states that it uses a standard documentation form (Texas Pricing Schedule/E911) that captures details regarding a CLEC's serving area and AT&T Texas's system configuration for the relevant selective routers. A similar form is in the current UTEX-AT&T Texas ICA, and UTEX has not explained its objection to continuing to provide such important information. AT&T Texas contends that the new ICA should contain terms and conditions establishing how the parties will document E911 arrangements between UTEX, AT&T Texas, and the relevant PSAPs so that it is clear how E911 service will be configured. This ensures emergency calls are completed.⁵⁵⁸

Arbitrators' Decision

The Arbitrators find that the language offered by AT&T Texas and disputed by UTEX was approved for the CLEC Coalition ICA in Docket No. 28821 and adopt that language for this ICA.

AT&T E911-16

Should the agreement state that the parties' liability for loss associated with an E911 failure is limited only by provisions in the General Terms and Conditions (GTCs), or should it also reference the Texas Health and Safety Code?

UTEX's Position

UTEX states that it does not oppose a reference to the Health and Safety Code if it correctly characterizes and applies that law.⁵⁵⁹

⁵⁵⁷ UTEX Initial Br. at 196.

⁵⁵⁸ AT&T Texas Ex. 21, Pellerin Direct, at 80:5-12.

⁵⁵⁹ UTEX Initial Br. at 196.

AT&T Texas's Position

AT&T Texas contends that, in addition to referencing the GTCs, the ICA should also articulate that the parties' liability in the event of loss arising from provision of E911 service is limited by Texas Health and Safety Code § 771.053. AT&T Texas's liability and indemnity provisions in the GTCs are sufficient for non-emergency services but are inadequate for protection against potential catastrophic loss associated with an E911 failure that might occur in the normal course of business (*e.g.*, accidental cable cut).⁵⁶⁰

Arbitrators' Decision

The Arbitrators conclude that AT&T Texas's proposed language should be included in the ICA because that language accurately characterizes the relevant statute and because the Commission approved that language in the Docket No. 28821 CLEC Coalition ICA.

AT&T E911-17

Should the 911 attachment address non-SS7 interconnection?

UTEX's Position

UTEX contends that AT&T Texas may have chosen to stay in the Stone Age, but the rest of the industry, and particularly E911, is rapidly evolving to new technology methods and techniques. The ICA should at least provide for a means for the parties to adapt to those changes.⁵⁶¹

AT&T Texas's Position

AT&T Texas notes that UTEX has offered language regarding non-SS7 interconnection and refers to the Attachment NIM as the controlling document. AT&T Texas's network uses circuit switching that utilizes either Multifrequency or SS7 signaling. AT&T Texas points out that there are several different NIM attachments with UTEX-offered language, such as ISDN, ATM, and SIP, and that ISDN is a PBX trunk service, which is not a even signaling protocol for circuit

⁵⁶⁰ AT&T Texas Ex. 21, Pellerin Direct, at 80:23-81:2.

⁵⁶¹ UTEX Initial Br. at 196.

switches. AT&T Texas contends that none of these are actual forms of interconnection that AT&T Texas can accommodate, and to do so would be far beyond the scope of AT&T Texas's obligations under FTA §§ 251 and 252.⁵⁶²

Arbitrators' Decision

The Arbitrators agree that AT&T Texas is under no obligation to provide interconnection or E911 technologies that are not currently part of its network. Inclusion of terms for such technologies would be speculative and thus inappropriate. The Arbitrators find AT&T Texas's language reasonable and adopt it.

Performance Measures and Liquidated Damages

DPL Issues: UTEX 56 through UTEX 60, AT&T PM-1 and AT&T PM -2, AT&T UNE 16 (a)-(b)

UTEX's Position

UTEX states that its proposed Attachment 5 on Liquidated damages is relevant given that Order 30 removed UTEX's refresh liquidated damage terms.⁵⁶³ UTEX opines that AT&T Texas's proposed language on performance standards and measurements does not adequately compensate CLECs for breaches of ICA terms by AT&T Texas and instead AT&T Texas "uses them as a sword and regularly abuses the purpose and intent."⁵⁶⁴ UTEX is, however, willing to largely accept the Performance Measures (PMs) approved by the Commission in its various dockets, including Docket No. 28821.⁵⁶⁵ UTEX raises two specific concerns about AT&T's proposed language. First, UTEX contends that AT&T is not proposing to use the T2A or T2A2 PMs or remedies and AT&T Texas's proposed terms are different because they come from its generic agreement, which has not been reviewed by the Commission under FTA § 252(c) or (e)(2)(B).⁵⁶⁶ Second, AT&T Texas's proposed performance measures do not address

⁵⁶² AT&T Texas Ex. 19, Neinast Direct, at 15:19-16:7.

⁵⁶³ Joint Ex. 1, Joint DPL, at UTEX 56, UTEX Position.

⁵⁶⁴ *Id.*

⁵⁶⁵ UTEX Initial Br. at 135.

⁵⁶⁶ Joint Ex. 1, Joint DPL, at UTEX 56, UTEX Position.

interconnection or several UNEs like subloops or loops to a NID on a pole.⁵⁶⁷ UTEX claims that its proposed language on liquidated damages addresses interconnection and UNEs and therefore should be approved.⁵⁶⁸ UTEX claims that AT&T Texas's generic language is designed to shift focus from the issues that matter in this proceeding, namely, interconnection; intercarrier compensation; and signaling, routing, and rating of traffic to and from UTEX's non-carrier customers, and AT&T's proposal seeks to inject issues that have already been litigated and disposed of in previous arbitrations, including Docket No. 28821.⁵⁶⁹

AT&T Texas's Position

AT&T Texas states that while its proposed contract language is taken from the generic agreement, its proposed language in Performance Measurements in Attachment 17 and the associated Stand-Alone Commercial Remedy Plan are exactly the same as that negotiated in Docket No. 28821.⁵⁷⁰ AT&T Texas explains that during Docket No. 28821, the parties were directed to discuss an alternative to the T2A performance measurement plan and nearly every aspect of the Performance Measurement Plan was agreed upon by virtually the entire industry, with only four issues (the appropriate benchmark levels for four disaggregated submeasures of two measurements) resolved by the Commission through arbitration.⁵⁷¹ In addition to the performance measures, the parties in Docket No. 28821 negotiated and agreed upon a commercial contract independent of the ICA (a stand-alone Performance Remedy Plan) that would provide legally binding liquidated damages and financial incentives sufficiently adequate to discourage any deliberate attempts to deny CLECs a meaningful opportunity to compete.⁵⁷² AT&T Texas points out that its proposed Attachment 17 containing the Performance Measures refers to the stand-alone performance remedy plan and clearly indicates that enforcement through liquidated damages for failure to meet certain performance measures in Attachment 17 is

⁵⁶⁷ *Id.*; UTEX Initial Br. at 135.

⁵⁶⁸ Joint Ex. 1, Joint DPL, at UTEX 56, UTEX Position.

⁵⁶⁹ *Id.*

⁵⁷⁰ AT&T Ex. 7, Direct Testimony of William R. (Randy) Dysart ("Dysart Direct"), at 8:8-14.

⁵⁷¹ *Id.* at 3:4-9.

⁵⁷² *Id.* at 5:3-6 & 5:16-25.

available through a separate agreement of the parties.⁵⁷³ AT&T Texas avers that although UTEX was aware of the development of the post-T2A Plan and the stand-alone Remedy Plan in Docket No. 28821, it chose not to participate and thereby influence the development of the performance measurements or the stand-alone remedy plan.⁵⁷⁴

With respect to UNEs that UTEX believes are not addressed by the performance measures that AT&T Texas lists as DS-1, DS-3, DSL, copper loops, and sub-loops, AT&T Texas states that the performance measurements included in Attachment 17 include measurements for pre-ordering, provisioning, and maintenance of all UNEs required by the FTA including those listed by UTEX.⁵⁷⁵ AT&T Texas states that how and where UNEs are connected is not material to the performance measurements.⁵⁷⁶ Therefore, if it is determined, for example, that it is appropriate for UTEX to have a certain UNE such as a DS1 UNE terminated at a NID on a pole, then that UNE will be measured, according to AT&T Texas.⁵⁷⁷ AT&T Texas also explains that the performance measures include measurements for resold services, grade of service for the local service center and local operations center, interconnection trunk blockage, coordinated conversions, and SS7 links.⁵⁷⁸ The measurements for SS7 links are included in the Interconnection Trunk disaggregation in the provisioning and maintenance measurements.⁵⁷⁹

AT&T Texas advocates the adoption of its proposed Attachment 17 because the performance measurements contained in Attachment 17 and the associated stand-alone Performance Remedy Plan represent a broad industry consensus on the subject matter and were approved in Docket No. 28821; Attachment 17 has defined standards for performance, which is a critical element in any performance plan; and finally, UTEX has not provided evidence that it will be ordering any UNEs that are not provided for in the current industry-negotiated performance measures and stand-alone remedy plan.⁵⁸⁰ AT&T Texas contends that UTEX's liquidated damage proposal is already covered in the AT&T Texas performance measurement attachment and the stand-alone

⁵⁷³ *Id.* at 5:9-13.

⁵⁷⁴ *Id.* at 6:9-7:3.

⁵⁷⁵ *Id.* at 9:1-6.

⁵⁷⁶ *Id.* at 9:8.

⁵⁷⁷ *Id.* at 9:8-10.

⁵⁷⁸ *Id.* at 6:1-8, 10:12-15.

⁵⁷⁹ *Id.* at 10:12-15.

Performance Remedy Plan.⁵⁸¹ AT&T Texas argues that UTEX's proposed language on liquidated damages is not only poorly defined but is located in multiple attachments in the ICA, which causes unnecessary duplication and confusion, and is not supported by clearly defined performance standards or methods to measure AT&T Texas's performance results.⁵⁸²

Arbitrators' Decision

The Arbitrators adopt AT&T Texas's proposed Attachment 17, which refers to an associated stand-alone Performance Remedy Plan Agreement. The Arbitrators note that UTEX is not generally opposed to the adoption of AT&T Texas's proposed language but has expressed several specific concerns. UTEX argues that AT&T Texas is not proposing to use the T2A or T2A2 PMs or remedies and that AT&T Texas's proposed terms are different because they come from its generic agreement, which has not been reviewed by the Commission under FTA § 252(c) or (e)(2)(B). However, based on a review of AT&T Texas's proposed language in Attachment 17 and AT&T Texas witness Mr. Dysart's testimony, the Arbitrators conclude that AT&T Texas's proposed language in Performance Measurements in Attachment 17 and the associated stand alone Performance Remedy Plan are exactly the same as the terms that were negotiated and approved in Docket No. 28821. The Arbitrators note that the proposed performance measurements and the associated stand-alone remedy were developed through industry-wide negotiations in Docket No. 28821, but UTEX chose not to participate or influence the development of the performance measurements or the stand-alone remedy plan.

With respect to the UNEs and interconnection that UTEX believes are not addressed in Attachment 17, the Arbitrators find that UTEX does not provide any specific evidence to support its claims. The Arbitrators rely on AT&T Texas's testimony that its proposed language addresses the interconnection and UNEs sought by UTEX. The Arbitrators note that UTEX has sought UNE terms relating to the connection of the loop and sub-loop to the network interface device on a pole and small volume splicing that are based on the CJP ICA approved by the Commission in Docket No. 28821. In ruling on those UNE terms in DPL Issue AT&T UNE-19,

⁵⁸⁰ *Id.* at 7:4-17.

⁵⁸¹ *Id.* at 10:16-20.

⁵⁸² *Id.* at 10:20-22, 12:4-16:13.

the Arbitrators have adopted the relevant provisions on these UNE terms from the CJP ICA. Given that the CJP ICA was approved in 2005 in Docket No. 28821, the Arbitrators expect that the performance measures and the stand-alone remedy plan approved in Docket No. 28821 and adopted in this proceeding adequately address these UNEs.

Duty to Negotiate in Good Faith

DPL Issues: UTEX 65 through UTEX 71

Relevant Statutes and Rules

- FTA § 251(c)(1): “[E]ach incumbent local exchange carrier has the . . . [d]uty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection.”⁵⁸³
- FTA § 252(b)(5): “The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.”⁵⁸⁴
- FCC Rule 51.301(c): “If proven to . . . an appropriate state commission . . . the following actions or practices, among others, violate the duty to negotiate in good faith:
 . . .
 (1) Demanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission, or in support of a request for arbitration under section 252(b)(2)(B) of the Act;
 . . .
 (6) Intentionally obstructing or delaying negotiations or resolutions of disputes;

⁵⁸³ 47 U.S.C. § 251(c)(1).

⁵⁸⁴ 47 U.S.C. § 252(b)(5).

- (7) Refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and
- (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:
 - (i) Refusal by an incumbent LEC to furnish information about its network that a requesting telecommunications carrier reasonably requires to identify the network elements that it needs in order to serve a particular customer; and
 - (ii) Refusal by an incumbent LEC to furnish cost data that would be relevant to setting rates if the parties were in arbitration.⁵⁸⁵

UTEX's Position

UTEX states that AT&T Texas violated its duty to negotiate in good faith under FTA §§ 251(c)(1) and 252(b)(5) and FCC Rules 51.301(c)(1), (6), (7), (8)(i), and (8)(ii).⁵⁸⁶ UTEX states that AT&T Texas “would not meet, particularly in 2010.”⁵⁸⁷ UTEX states that AT&T Texas “would not discuss substance, particularly in 2010.”⁵⁸⁸ UTEX specifically cites a letter from AT&T Texas dated February 26, 2010 that, according to UTEX, shows that AT&T Texas refused to negotiate VoIP compensation terms with UTEX.⁵⁸⁹ UTEX also states that AT&T Texas lied when it stated that it will not negotiate unique VOIP-related compensation terms with any CLEC.⁵⁹⁰ According to UTEX, AT&T Texas’s testimony from Docket No. 33323 shows that AT&T Texas will negotiate such terms.⁵⁹¹ UTEX states that AT&T Texas would not answer questions or take a position on several issues, especially the call flow diagrams.⁵⁹² UTEX states that AT&T Texas refused to designate a representative with authority to make binding

⁵⁸⁵ 47 C.F.R. § 51.301(c).

⁵⁸⁶ UTEX Initial Br. at 136 & 138. UTEX cites FCC Rule 51.301(b)(1). No such rule exists, so the Arbitrators have assumed that UTEX meant to cite FCC Rule 51.301(c)(1).

⁵⁸⁷ UTEX Initial Br. at 137.

⁵⁸⁸ *Id.*

⁵⁸⁹ UTEX Ex. 1, Feldman Direct, at 234:5-235:5; UTEX Initial Br. at 136-37.

⁵⁹⁰ UTEX Ex. 1, Feldman Direct, at 235:6-7.

⁵⁹¹ *Id.* at 234:4-5.

⁵⁹² UTEX Initial Br. at 137.

representations.⁵⁹³ UTEX states that AT&T Texas refused to provide UTEX with information necessary to determine the availability of fiber.⁵⁹⁴ UTEX states that AT&T Texas refused to provide cost information unless UTEX executed a nondisclosure agreement, in violation of FCC Rule 51.301(b)(1).⁵⁹⁵ UTEX states that AT&T Texas asserted it does not have and never had SIP in its network but that this assertion is not true, as shown by AT&T Texas's filings with the Commission regarding PLEXAR IP.⁵⁹⁶ Finally, UTEX states that "AT&T should suffer adverse decisions on its substantive proposals on account of its violations" and that "the Commission should investigate whether AT&T should suffer administrative penalties."⁵⁹⁷

AT&T Texas's Position

AT&T Texas states that UTEX has not proven that AT&T Texas violated its duty to negotiate in good faith.⁵⁹⁸ AT&T Texas witness Jennifer Bracken states that she assumed the role of lead negotiator with UTEX in January 2010 and that she was not personally involved in the negotiations with UTEX prior to the docket being abated.⁵⁹⁹ Ms. Bracken states that, in all negotiations with a CLEC, AT&T Texas has a person present who can make decisions.⁶⁰⁰ Ms. Bracken states that she has "no basis to find that AT&T Texas acted in any manner other than in good faith in its negotiations with UTEX."⁶⁰¹

Regarding UTEX's claim that AT&T Texas refused to negotiate since the unabatement, Ms. Bracken states that AT&T Texas and UTEX have engaged in informal negotiations during that time.⁶⁰² Ms. Bracken further states that it was not feasible for the parties to have extensive negotiations during the arbitration due to the limited timeframes allowed under the FTA.⁶⁰³

⁵⁹³ *Id.* at 138.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* at 139.

⁵⁹⁷ *Id.*

⁵⁹⁸ AT&T Texas Initial Br. at 107-110.

⁵⁹⁹ AT&T Texas Ex. 3, Direct Testimony of Jennifer Bracken (Bracken Direct), at 5:9-13.

⁶⁰⁰ *Id.* at 5:18-21.

⁶⁰¹ *Id.* at 6:14-17.

⁶⁰² AT&T Texas Ex. 4, Rebuttal Testimony of Jennifer Bracken (Bracken Rebuttal), at 3:7-10.

⁶⁰³ *Id.* at 4:5-13.

Regarding UTEX's allegations that AT&T Texas has negotiated VoIP compensation terms with other CLECs, Ms. Pellerin stated that UTEX refused to accept the terms of AT&T Texas's agreement with Level 3.⁶⁰⁴ Ms. Pellerin further states that AT&T Texas's refusal to accept UTEX's demands does not amount to a failure to act in good faith.⁶⁰⁵

Regarding UTEX's allegation that AT&T Texas refused to provide pre-order information for dark fiber, Ms. Pellerin states that the Commission found against UTEX on this same issue in Docket No. 33323 and that this is the seventh time UTEX has raised this complaint.⁶⁰⁶

Regarding UTEX's claim that AT&T Texas failed to provide its cost information to UTEX, Ms. Pellerin states that non-disclosure agreements are very common in the industry and that AT&T Texas's failure to provide the confidential cost information does not constitute a failure to act in good faith.⁶⁰⁷ Ms. Pellerin also states that AT&T Texas disputes UTEX's claim to SS7 B-Links, does not presently have the cost information requested by UTEX, and should not be required to perform the cost study required to develop that information unless the Commission finds in UTEX's favor on the SS7 B-Link issue. Ms. Pellerin noted that the Commission previously determined that bad faith involves intentional deception and that AT&T Texas's refusal to conduct a cost study is not deceptive.

Regarding UTEX's claim regarding PLEXAR IP, Ms. Pellerin states that PLEXAR IP was withdrawn in 2005 because there were no customers and no anticipation of future customers.⁶⁰⁸ Ms. Pellerin also states that she assumes the IP portion of the service would be provided by an AT&T Texas affiliate, not by AT&T Texas itself, because AT&T Texas does not and never has had SIP in its network, as explained by AT&T Texas witness Mark Neinast.⁶⁰⁹

In addition, AT&T Texas states that the duty to negotiate in good faith is not a proper arbitration issue because it does not bear on the resolution of any disputed contract language.⁶¹⁰ AT&T Texas states that, if a party to negotiations under FTA § 252(a) believes the other party is not negotiating in good faith, the aggrieved party can seek a remedy at that time, before the

⁶⁰⁴ AT&T Texas Ex. 22, Pellerin Rebuttal, at 14:1-23.

⁶⁰⁵ *Id.* at 14:1-23.

⁶⁰⁶ *Id.* at 15:7-16 & n. 9.

⁶⁰⁷ *Id.* at 15:17-16:9.

⁶⁰⁸ *Id.* at 17:10-20.

⁶⁰⁹ *See* AT&T Texas Ex. 19, Neinast Direct, at 29:11-12.

arbitration commences.⁶¹¹ AT&T Texas states that allegations of failure to negotiate in good faith have no place in an arbitration because no remedy is available at that stage.⁶¹² According to AT&T Texas, a state commission must approve an ICA consistent with the substantive requirements of FTA § 251.⁶¹³

Arbitrators' Decision

The Arbitrators conclude that AT&T Texas did not violate its duty to negotiate in good faith. First, UTEX states that AT&T Texas refused to meet with UTEX. UTEX did not indicate specific dates on which AT&T Texas declined to meet with UTEX, however, and the evidence shows that AT&T Texas offered to meet or have a conference call with UTEX on many occasions.⁶¹⁴ For these reasons, the Arbitrators conclude UTEX did not establish that AT&T Texas breached its duty to negotiate in good faith by refusing to meet with UTEX.

Second, UTEX states that AT&T Texas failed to discuss substantive issues, especially in 2010 after the Commission unabated this docket. Taken as a whole, the evidence shows that the parties have discussed substantive matters and, indeed, have had significant disagreements about the resolution of those matters. The evidence specifically shows that AT&T Texas negotiated with UTEX in 2010.⁶¹⁵ In addition, to the extent that AT&T Texas has focused on this arbitration rather than on additional negotiations with UTEX since the unabatement, that focus appears to be the result of the fast pace of this docket during that time.⁶¹⁶ As the Arbitrators have

⁶¹⁰ AT&T Texas Initial Br. at 107-08.

⁶¹¹ *Id.* at 108.

⁶¹² *Id.*

⁶¹³ *Id.* at 108.

⁶¹⁴ See, e.g., UTEX Ex. 2, Feldman Direct Exhibits, at 3 (email from C. Townes to L. Feldman dated Aug. 12, 1999) (“We have both blocked off August 24, to meet with WCC and will be pulling in the necessary SMEs.”), 361 (email from T. Mansir to L. Feldman dated Sept. 21, 2001) (“Would you and Scott McCollough [sic] be available for a face-to-face meeting in Dallas on October 9th, 10th, or 11th to discuss ISDN, Collocation and Dark Fiber issues?”), and 539 (email from T. Horn to S. McCollough dated Jan. 19, 2010) (“As you propose, let’s schedule a call with our business clients for 1/27 before 12:30 pm or after 2:30 pm that day.”).

⁶¹⁵ *Id.* at 547 (letter from T. Horn to S. McCollough dated Feb. 26, 2010) (“[T]he parties did substantively resolve that UTEX was no longer sponsoring issues related to ISDN and ATM interconnection and AT&T Texas concurred; similarly, AT&T Texas withdrew its attachments for BCR and DAL and UTEX concurred. Moreover, there remain other issues pending resolution including the Structure Access attachment where we remain hopeful that the issue is resolved.”); AT&T Texas Ex. 4, Bracken Rebuttal, at 3:7-10.

⁶¹⁶ UTEX Ex. 2, Feldman Direct Exhibits, at 536 (email from T. Horn to S. McCollough dated Jan. 21, 2010) (“Any suggestion that our respective clients need to be engaged in extensive negotiation meetings with UTEX

previously noted, UTEX largely controlled that pace.⁶¹⁷ The Arbitrators find that it would be unreasonable to require parties to expend significant resources on negotiations after one of the parties has initiated an arbitration pursuant to FTA § 252. As the FCC has recognized, Congress created compulsory arbitration as a *remedy* for a party's failure to negotiate in good faith.⁶¹⁸ This suggests that the parties are not expected to continue to engage in robust negotiations during the pendency of an arbitration proceeding. The Arbitrators note that parties are, of course, encouraged to resolve their differences during an arbitration to the extent possible. With respect to negotiations regarding VoIP compensation terms, the evidence shows that AT&T Texas proposed terms regarding that issue but that UTEX refused to accept those terms.⁶¹⁹ For these reasons, the Arbitrators conclude that UTEX did not establish that AT&T Texas breached its duty to negotiate in good faith by refusing to discuss substantive matters.

Third, UTEX states that AT&T Texas would not provide its positions on issues such as UTEX's call flow diagrams. AT&T Texas clearly indicated in its discovery responses that those diagrams lacked information necessary for AT&T Texas to provide its position on the diagrams completely. The Arbitrators agree with AT&T Texas that the diagrams lacked necessary information and conclude that AT&T Texas did not intentionally obstruct or delay resolution of issues related to those diagrams.⁶²⁰ For these reasons, the Arbitrators conclude that UTEX did not establish that AT&T Texas breached its duty to negotiate in good faith by refusing to provide its positions on the call flow diagrams.

Fourth, UTEX states that AT&T Texas refused to designate someone with authority to negotiate for AT&T Texas. AT&T Texas witness Ms. Bracken testified, however, that AT&T

while our clients are simultaneously under a daunting task to update a 1,500 page DPL while condensing the terms to one hundred pages may be counterproductive at this juncture. . . . In large part our current predicament could have been alleviated by your agreeing to extend the statutory deadline to allow the time to have more discussions as you propose.”) and 549 (letter from T. Horn to S. McCollough dated Feb. 26, 2010) (“We remain, under the time constraints imposed by the arbitration, always willing to discuss subject areas where negotiation is appropriate. AT&T Texas cautions that any such discussions not interfere with and/or risk delaying this case in a manner not consistent with FCC and Commission directives.”); AT&T Texas Ex. 4, Bracken Rebuttal, at 4:5-13.

⁶¹⁷ Order No. 32 at 3-4 (Mar. 25, 2010).

⁶¹⁸ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, First Report and Order ¶ 149, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996).

⁶¹⁹ AT&T Texas Ex. 22, Pellerin Rebuttal, at 14:1-23.

⁶²⁰ *See* UTEX's First RFIs/RFAs to SBC Texas at 9-54 (Sept. 22, 2005).

Texas has someone with authority to make decisions present in all negotiations with CLECs.⁶²¹ Furthermore, UTEX did not establish that AT&T Texas failed to make such a person available “throughout the negotiation process” or that such failure “significantly delay[ed] resolution of issues,” as required for a finding of lack of good faith negotiations under FCC Rule 51.301(c)(7). And, indeed, the evidence shows that AT&T Texas did designate a specific person with authority to make decisions during at least a portion of the negotiations.⁶²² For these reasons, the Arbitrators conclude that UTEX did not establish that AT&T Texas breached its duty to negotiate in good faith by refusing to designate someone with authority to make decisions.

Fifth, UTEX states that AT&T Texas refused to negotiate “with regard to the ‘fiber’ issues” and refused to provide fiber pre-order information to UTEX. The evidence shows that AT&T Texas did negotiate with UTEX but that the parties had fundamental disagreements about the substance of the ICA with respect to that issue.⁶²³ Furthermore, UTEX did not cite specific evidence in the record showing that AT&T Texas refused to provide fiber pre-order information to UTEX. For these reasons, the Arbitrators conclude that UTEX did not establish that AT&T Texas breached its duty to negotiate in good faith with respect to the fiber issues.

Sixth, UTEX states that AT&T Texas refused to provide certain cost information unless UTEX signed a non-disclosure agreement. FCC Rule 51.301(c)(1) states that an ILEC violates its duty to negotiate in good faith if it demands that another party sign a non-disclosure agreement that precludes the other party from providing information requested by the FCC, a state commission, or in support of a request for arbitration under FTA § 252.⁶²⁴ UTEX did not establish that AT&T Texas’s non-disclosure agreement violated this rule, nor did UTEX establish that the agreement was otherwise unreasonable. For these reasons, the Arbitrators conclude that UTEX did not establish that AT&T Texas breached its duty to negotiate in good

⁶²¹ AT&T Texas Ex. 3, Bracken Direct, at 5:18-21.

⁶²² UTEX Ex. 2, Feldman Direct Exhibits, at 381 (email from T. Mansir to L. Feldman dated Oct. 16, 2001) (“Let me assure you that I am the individual empowered to make decisions in negotiations and I will do so when I have been provided sufficient information to make a decision. Please be confident that I will have the proper subject matter experts available.”).

⁶²³ See, e.g., UTEX Ex. 2, Feldman Direct Exhibits, at 380-81 (email from T. Mansir to L. Feldman dated Oct. 16, 2001) (“Finally, with respect to the September 6th negotiation session on Dark Fiber, your questions were addressed by myself and my SME. You chose to reject SBC’s proposed language in full without offering any counter language for us to consider.”).

⁶²⁴ 47 C.F.R. § 51.301(c)(1).

faith by requiring UTEX to sign a non-disclosure agreement before AT&T Texas would provide cost information to UTEX.

Seventh, UTEX states that AT&T Texas was not truthful when it denied having SIP in its network. AT&T witness Ms. Pellerin testified that AT&T Texas withdrew its PLEXAR IP offering in 2005 because there were no customers and no anticipation of future customers.⁶²⁵ AT&T Texas witness Mark Neinast testified that “AT&T Texas does not have any IP protocol in its network.”⁶²⁶ Based on Mr. Neinast’s testimony, Ms. Pellerin stated that she assumes the IP portion of the PLEXAR IP service would have been provided by an AT&T Texas affiliate, not by AT&T Texas itself.⁶²⁷ UTEX did not provide evidence refuting AT&T Texas’s testimony that it does not have SIP in its network. For this reason, UTEX failed to establish that AT&T Texas breached its duty to negotiate in good faith by denying that it has SIP in its network.

Finally, the Commission may only approve an ICA resulting from compulsory arbitration if the terms of the ICA are consistent with FTA §§ 251 and 252 and the FCC’s rules implementing those sections.⁶²⁸ Therefore, while the Arbitrators have found in the preceding paragraphs that AT&T Texas did not violate its duty to negotiate in good faith, even if UTEX had established such a violation, the Commission could not remedy that violation by approving ICA terms that are not consistent with the FTA and the FCC’s implementing rules.

V. CONCLUSION

The Arbitrators conclude that the decisions outline in the Award and the Award matrix, as well as the conditions imposed on the parties by these decisions, meet the requirements of FTA § 251 and any applicable regulations prescribed by the FCC pursuant to FTA § 251.

⁶²⁵ AT&T Texas Ex. 22, Pellerin Rebuttal, at 17:10-20.

⁶²⁶ AT&T Texas Ex. 19, Neinast Direct, at 29:11-12.

⁶²⁷ AT&T Texas Ex. 22, Pellerin Rebuttal, at 17:10-20.

⁶²⁸ 47 U.S.C. § 252(c).

SIGNED AT AUSTIN, TEXAS on the 23rd day of September, 2010.

**MEENA THOMAS
ARBITRATOR**

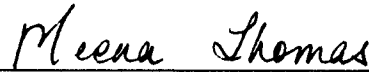
**PATRICK H. PETERS III
ARBITRATOR**

**DAVID B. SMITHSON
ARBITRATOR**

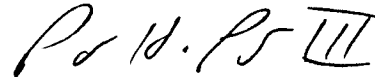
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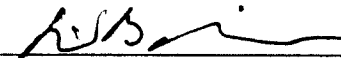
SIGNED AT AUSTIN, TEXAS on the 23rd day of September, 2010.



**MEENA THOMAS
ARBITRATOR**



**PATRICK H. PETERS III
ARBITRATOR**



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